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No. 90-1653

In The

Supreme Court of the United States

October Term, 1991

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP,

Petitioner,

vs.

CITY OF ST. PAUL and CONTINENTAL CABLEVISION OF ST. PAUL, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX – VOLUME I

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THE QUESTIONS PRESENTED

1. Should this Court conduct an independent review of the record to determine whether clear and convincing evidence exists to support findings that, despite the defendant City's admission that petitioner Nor-West was a cable television operator similarly situated with the monopoly franchise holder, Nor-West lacked standing to assert prior restraint violations of its rights to speak and to publish?

2. Should this Court make whatever determinations are necessary, based on the fully developed record, to define a municipality's powers to restrict competition in the cable television field?

3. Should this Court, in an area the District Court and the Court of Appeal declined to enter, make rulings about which, if any, municipal exactions as conditions for the right to speak and publish by cable are constitutionally permissible?

4. Should this Court clarify the principles expressed in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S 488 (1986) and *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S 485 (1984), principles which have led to inconsistent rulings and requests for guidance from the lower courts?

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IDENTIFICATION OF DISMISSED PARTIES

The District Court dismissed Continental Cablevision of St. Paul, Inc. and Kalba Bowen Associates, Inc. from this litigation.

OPINIONS BELOW

After Nor-West filed a complaint on September 2, 1983 (Appendix 9), followed by an amended complaint in March, 1984 (Appendix 10), the District Court dismissed all causes of action. (See Appendix 4; Appendix 5) The Court of Appeals for the Eighth Circuit remanded the matter. (See 802 F.2d 462 and Appendix 6) On remand, the District Court allowed Nor-West's First Amendment and Equal Protection claims to proceed. (Appendix 6)

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit (924 F.2d 741), which was filed on January 25, 1991, is printed at Appendix 1. The District Court's Order For Judgment, dated September 1, 1988, is printed at Appendix 2. The District Court's Order of February 27, 1989 is printed at Appendix 3.

JURISDICTION

The jurisdiction of the District Court is based on 28 United States Code sec. 1331, arising from plaintiff's claim under 42 U.S.C. sec. 1983. The jurisdiction of the Court of Appeals is based on 28 U.S.C. sec. 1291. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article III (Appendix 7), First Amendment (Appendix 8).

THE RELIEF REQUESTED AND ITS BROADER EFFECT

Petitioner (Nor-West) requests this Court to:

1. Conduct an independent review of the record, which included an admission that Nor-West had standing as a cable television operator, to determine whether clear and convincing evidence exists to support findings that Nor-West *lacked* standing to assert a prior restraint violation of its First Amendment rights; and

2. Make whatever determinations are necessary to define a municipality's powers to restrict competition in the cable television field; and

3. Make rulings about which, if any, restrictions are unconstitutional; and

4. Reverse the Court of Appeals' judgment; or

5. Remand this matter for an independent review by the District Court or the Court of Appeals to determine the same issues, with guidance from this Court.

If granted, the relief sought would clarify principles established in:

a. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); and

b. *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

(*See, e.g., Pacific West Cable Co. v. City of Sacramento, Cal.*, 675 F.Supp. 1322, 1327 (E.D. Cal. 1987) ["The court is

especially concerned about the possibility of legal errors in this case inasmuch as the Supreme Court has explicitly declined to decide the legal issues raised by cable television franchising in the absence of a fully developed factual record"].)

STATEMENT OF THE CASE

The St. Paul, Minnesota City Council and the City's voters have disagreed over the City's role in the cable television field. After a 1979 task force determined how cable services could benefit the City, city officials invited proposals from private companies hoping to obtain a franchise. Seven companies responded – only to be rejected when the City decided to operate its own system. (Appendix 11, RT 2029, 2055, 2140-42, 2170, 2173, 2418-19, 3532) The plans for a municipal cable authority, however, were defeated at the general election. (Appendix II, RT 2029, 2055, 3532)

Having been denied full control over cable television activities, the City issued a new Request For Proposals (RFP) on November 1, 1982. (Appendix 12) The Mayor described those proposals, as follows:

> "[B]id specifications should be the most demanding in the country. St. Paul should be . . . a national model of utilizing municipal cable applications through the private franchising process. We are all aware of the budget crunch." (Appendix 11, RT 4270-71)

From 1982 onwards Nor-West Cable Communications Partnership (Nor-West) nevertheless tried to provide cable television services to the city's viewers. In doing so, Nor-West initially had to choose between complying with an apparently unconstitutional monopoly franchising

scheme or instituting litigation. Up to and including the present moment, no one has received judicial guidance on what restrictions, if any, the City constitutionally may impose on cable television First Amendment speakers.

The City's 1982 Request For Proposals (RFP), though couched in terms of a non-exclusive franchise, provided in practice that the winning franchise would be exclusive, regardless of whether Nor-West was willing to accept a non-exclusive franchise. (Appendix 10; Appendix 12) As the City's attorneys interpreted the situation, the franchise granted to Continental was considered non-exclusive only because: "The City has reserved its right to grant one or more additional franchises at such time, if ever, as it might wish to do so." (Appendix 13)

(Such a variance between language and effect has been judicially recognized. *See Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 712, fn. 1 (8th Cir. 1986) ["Although the franchises at issue in this case were nominally termed 'nonexclusive,' they were, in practical operation, exclusive."])

A document of more than 200 pages, the RFP governed all aspects of the cable television process, from the applicants' character qualifications (Appendix 12, p. 7), to the use of local talent (Appendix 12, p. 22), to the "high priority" the City placed on services which "will contribute to the overall efficiency and cost-effectiveness of City and other government services." (Appendix 12, p. 26) The City also emphasized its interest in being paid by First Amendment speakers. After stating that it had established an initial franchise fee of five percent on all gross annual receipts, the city added that:

> "Applicants should clearly indicate whether they will be willing to support an effort by the City to obtain a waiver of the franchise fee

> limits required by the Federal Communications Commission (FCC). * * * The City is also interested in exploring other forms of compensation, beyond the franchise fee. Applicants are encouraged to be creative in proposing innovative approaches for the City to generate revenues as a result of cable development in St. Paul." (Appendix 12, pp. 9-10)

Encouragement for "creative," "innovative" ways of taxing free speech was the apparent keystone of the selection process.

Rather than begin its operations in an adversarial manner, Nor-West applied for a franchise on the terms which the City had established. (Appendix 10, Appendix 14) So impressive were Nor-West's qualifications, as compared to Continental and one other applicant, that the City Council voted on June 30, 1983 to award the franchise to Nor-West. The Mayor, however, vetoed that award. (Appendix 11, RT 63-64, Appendix 10) On reconsideration, the Council awarded the single franchise to Continental. (Appendix 1, p. 2)

The City then barred Nor-West from offering its programming to the residents, even when Nor-West made serious efforts in late 1983 to obtain permission to place its cables on public utility poles. (Appendix 11, RT 702-703) Continental alone was provided with official sanction to install cables within the City limits, despite the fact that Nor-West had already spent more than $265,000.00 in complying with the City's conditions. (Appendix 2, p. 3) (Nor-West could have spent all reasonably necessary amounts, with funds drawn from Nor-West's partners' net worth of approximately $76 million dollars. (Appendix 11, RT 47, 2556))

Finding a forum in which to obtain a remedy was difficult. (By an express admonition, the District Court

informed the trial jury that neither the Cable Communications Board nor the Minnesota Supreme Court had resolved the relevant constitutional issues. (Appendix 11, RT 254))

Nor-West addressed the constitutional issues in the present federal litigation, which originally named the City as the sole defendant. (Appendix 9) At Continental's request, the District Court permitted Continental to appear as a defendant in intervention. (Appendix 15) Nor-West filed an amended complaint, adding Kalba Bowen Associates, Inc., the City's franchising consultant, as a defendant and identifying Continental as a defendant in intervention. (Appendix 10, Appendix 17) The allegations justifying relief against Continental declared that, through an unlawful conspiracy, the defendants wrongfully had prevented Nor-West from operating a cable television system in the City. (Appendix 10, pp. 1, 7-9) By agreeing to pay all costs for the City's unconstitutional activities in keeping Nor-West and other potential competitors out of the market, Continental converted to its own use the constitutional rights of others to speak and to publish and had become the real party in interest in this litigation. (Appendix 17)

While this litigation was in its early stages, Nor-West, on December 5 and 28, 1983, again requested a non-exclusive cable franchise, which would have permitted Nor-West to compete with Continental. Nor-West wrote that: "Nor-West continues to offer to meet all of the lawful requirements, as well as to meet the lawful requirements contained in the franchise issued to Continental Cablevision." (Appendix 16)

The City rejected Nor-West's applications on the ground that Nor-West had challenged the validity of the

franchising process in federal court [i.e., Nor-West was seeking vindication of its constitutional rights]. "The City has confidence in the validity and integrity of its process," its attorneys declared, "but under the adversarial conditions created by your client [i.e., Nor-West] the City of St. Paul declines to consider the desirability of granting a franchise to Nor-West at this time." (Appendix 13)

The refusal to allow Nor-West to broadcast its message has characterized the City's position throughout this litigation, despite the City's formal admission of Nor-West's eligible status. As the District Court instructed the jury:

> "[T]he plaintiff [Nor-West] and Continental Cablevision are both members of a class of persons known as cable television operators and for purposes of the case it is alleged that the plaintiff and the cable – plaintiff and Continental Cablevision are similarly situated members of that class and that allegation in the complaint was admitted in the answer." (Appendix 11, RT 2029-2030)

Two months after Nor-West filed this litigation, the City and Continental entered into two separate indemnity agreements. (Appendix 17) The first agreement provided that Continental would hold the City harmless from any claim advanced as a result of the franchising procedures, the awarding of the cable communications franchise to anyone else or the failure to award the franchise to anyone else. (Appendix 17) The second agreement, dated November 14, 1983, contained similar provisions but added indemnification for damages as a result of Continental's operation of the franchise, or the enactment of the franchise ordinance or its amendments, or any procedures leading to the enactment. (Appendix 17)

At the City's insistence, and over Nor-West's objections, the trial court excluded evidence of the agreements. (Appendix 11, RT 5493-96)

After Nor-West filed this litigation, the District Court dismissed Nor-West's complaint. The Court of Appeals reversed the judgment in light of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). On remand, the District Court allowed Nor-West to proceed, but only on First Amendment and Equal Protection claims. (Appendix 6)

Nor-West tried, unsuccessfully, to learn which of the City's restrictions, demands and conditions the District Court would treat as constitutionally valid. Knowing that information was essential before Nor-West could develop realistic plans for its proposed system. But despite Nor-West's lack of guidelines, a federal magistrate ordered Nor-West, in effect, to guess at what it was obliged to do. Despite Nor-West's contentions that it still did not know precisely which of the City's myriad requirements were lawful and that it would certainly obey those held lawful, the magistrate ruled that Nor-West:

> "is precluded from introducing at trial proof of any cable system or damages which does not fairly fall within the written expert submissions, which must be made in a timely fashion under the terms of the pretrial scheduling order . . . " (Appendix 18, p. 16)

The District Court affirmed these rulings. (Appendix 19; Appendix 20) On appeal, the Court of Appeals held that Nor-West was not prejudiced by the rulings and that, if there was prejudice, no reversible error had occurred. (Appendix 1, pp. 17-19)

Shortly before trial, Continental stated that it "does not intend to participate actively in the trial * * * and

therefore Continental does not intend to have counsel participate in the trial," subject to the District Court's approval. (Appendix 21, pp. 1-3) When the District Court suggested that Continental's counsel would be "kind of second chairing," Continental's attorney said, "We may or may not participate at all, Your Honor." To the court's suggestion that Nor-West did not care if "they come or don't come," Nor-West's attorney answered, "That is exactly right." (Appendix 22, RT 2)

Nor-West, however, insisted that Continental was and should remain a *party*, subject to damages. As Nor-West asserted, "By intervening, Continental made itself vulnerable to complete adjudication of the issues between it and Nor-West, including damages." (Appendix 23) Even so, the District Court permitted Continental to withdraw. The court later stated that Nor-West had not sought injunctive or monetary damages from Continental (despite conspiracy allegations which would have made Continental answerable) and that the jury's finding of "no damages" rendered Nor-West's arguments moot. (Appendix 3, p. 2, fn. 2)

The jury trial took eight weeks. As the District Court characterized the proceedings, the litigation was ably tried and hard fought. However: "The lack of law in the area provided continuing obstacles for the court as well as the parties." (Appendix 3, p. 2)

From Nor-West's perspective, the lack of legal guidance meant that Nor-West did not know and could not learn what type of system the City constitutionally could require Nor-West to build. Despite repeated requests for the District Court to identify the controls which the City could impose on Nor-West's plans, the court required Nor-West to commit itself in advance of this knowledge.

Nor-West had to say what it wanted to build before knowing what it would be expected to build or even allowed to build. (Appendix 11, RT 5750-51, 5753; Appendix 24, RT 5-7; Appendix 25, RT 15-18, 21-22, 34-35, 64-65, 174-177; Appendix 26, RT 3-4, 11-13, 23-25, 32)

A clear instance of the dilemma caused by the District Court's refusal to commit itself to constitutional standards was Nor-West's ignorance about the minimum size of an acceptable system. Although the City had demanded that the companies responding to the RFP provide universal service, i.e., cable availability for each of its residents, the court never told Nor-West (or the jury) whether such a requirement could lawfully be imposed upon a competing system built by Nor-West. Instead, Special Verdict question 16 asked, "Does St. Paul have a substantial interest in ensuring the availability of cable television service to all St. Paul residents?" The jury answered, "Yes." (Appendix 2, p. 3)

The absence of geographical guidelines prevented Nor-West from developing any realistic allocation of its financial resources. Under circumstances where cable television speakers are linked to their audience by individual hook-ups, the greater the system's size the greater the expense to build it. Similarly, the City's requirements to provide subsidies to "public access" programming, to set aside channel capacity for such programming, to construct a "dual cable" rather than single cable system, and numerous other requirements, when viewed together, vastly increased the potential cost of a competitive system. If one or all were held invalid, costs would drop significantly.

Moreover, the greater the use of overhead wires in constructing a cable system, as compared to underground

cables, the lower the expense and the less the disruption. To what extent, therefore, was the City acting lawfully when it demanded expedited underground construction in the downtown area so that City Hall would have early cable access? Could such expensive construction be required of a *second* system? (See Appendix 11, RT 3486-87, 4340; Appendix 27; Appendix 28)

Nor-West's "plan" for its cable system was to comply with all lawful requirements but to save the expense of complying with the City's unconstitutional demands. Regrettably, the trial court never ruled which requirements were lawful and which were not, yet asked the jury to decide whether Nor-West could afford to construct the system it "requested permission to build."

Over Nor-West's objections – and with a clear statement from the District Court that Nor-West had *not* waived its first line position – the District Court submitted special verdict questions to the jury. (Appendix 11, RT 1764; Appendix 25, RT 103, 160) All the questions (dealing with subjects like Nor-West's readiness, willingness and ability to build a cable television system) were presented *without* constitutional guidelines identifying which of the City's requirements were lawful and which were unlawful. Like Nor-West itself, the jurors never were informed about what conditions, if any, the City lawfully could have imposed on Nor-West's proposed system.

As the District Court advised counsel in chambers:

> "I don't know if you [the attorneys] can tell them [the jurors] precisely what the effect of their verdict is going to be, vis-a-vis my balancing, because I don't think you know. I don't think any of us know." (Appendix 25, RT 161)

Lacking these guidelines, the jurors found that Nor-West was not ready, willing or able to build "the cable television system it has requested permission to build in competition with Continental Cablevision," either in 1983 or at trial time. The jurors also found that Nor-West had suffered no damages as a result of its having been denied permission to build and operate a system. (Appendix 2, p. 3)

Most significantly, the jury found that the public utility facilities and rights of way could safely accommodate more than one cable television system. (Appendix 2, p. 3) A claim of physical limitations therefore would *not* have justified excluding Nor-West from operating a system. (*See Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), affirmed 476 U.S. 488 (1986)) To date, however, no court has defined what requirements the City lawfully could have imposed on an operator who wished to utilize available space on existing utility poles.

The District Court adopted the facts found by the jury. Through an erroneous characterization of Nor-West's arguments, the court stated that Nor-West previously had urged that "all factual determinations made by the jury are binding on the trial court." (Appendix 2, p. 5) Nor-West, however, consistently had taken a different position. (Appendix 23, pp. 51-53; Appendix 24, RT 3-4) In its trial brief, Nor-West did say that, "when claims at law and in equity are joined and the legal claims are tried separately by a jury, the jury's verdict operates as a finding of fact binding on the trial court in its determination of the equitable claims." (Appendix 23, p. 51) But Nor-West expressly pointed out that this general principle was subject to a significant exception:

> "Of course, the Court's exercise of its equitable powers must be viewed in light of the principles of *Bose* . . . in the event of an adverse jury finding where, as here, First Amendment rights are in issue." (Appendix 23, pp. 52-53)

Nor-West specifically objected to submitting Special Verdicts 5, 6 and 7 to the jury, contending that they were equitable questions:

> "[A]ll three [special verdicts] deal with the question of whether the Court is going to grant an injunction at this time and that is strictly a matter for the Court and the including of any facts involved in that, there is nothing that the jury can do for that matter that would amount to anything that would be binding on the Court so the only potential it would have would be to create a conflict between an advisory finding of the jury and the finding by the Court." (Appendix 24, RT 3)

To Nor-West's prejudice, however, the District Court overlooked Nor-West's explicitly-declared position when the court subsequently noted that:

> "Because the plaintiff insisted earlier that the jury verdict on the legal issue was binding on the trial court's determination of the equitable claims, the court is bound by the jury's findings. Further, the court chooses to be bound by the jury's findings. Finally, the court adopts such findings as the facts in this case." (Appendix 2, p. 5)

Based on findings that Nor-West was not ready, willing and able to operate a cable television system, the District Court held that Nor-West "was not and is not a cable operator entitled to First Amendment protection. Simply stated, the plaintiff lacks a legally protectable interest." (Appendix 2, p. 8) (The court thus ignored the City's *admission* that Nor-West *was* a member of "a class of persons known as cable television operators" and was

"similarly situated" with Continental. (Appendix 11, RT 2029-2030)) The court added that even if Nor-West had standing, it had suffered no damages. (Appendix 2, p. 8)

Although Nor-West could have recovered the $265,000.00 it spent in pursuing a franchise if the RFP were ruled unconstitutional, the District Court declared that Nor-West lacked standing to challenge the ordinance's constitutionality. Accordingly, Nor-West could not recover its expenditures. (Appendix 2, p. 9)

The District Court declared that even if it had been required independently to review the jury findings which were unfavorable to Nor-West's exercise of First Amendment rights, the court in effect had done so "by specifically choosing to adopt the findings of the jury as the facts in this action." (Appendix 3, p. 5)

The District Court rejected Nor-West's contention that the jury was forced to operate in a constitutional vacuum in answering the special verdict questions and that the jury could not properly have answered the questions without instructions on what kind of system Nor-West was legally required to build. (Appendix 3, p. 5) The court also rejected Nor-West's argument that the jury should have been instructed on what the result would be, depending on which of the City's defenses they found to exist:

> "The court considered plaintiff's request in this regard, but could find no way to instruct the jury in the manner now suggested. Even the plaintiff was unable to divine a way to instruct the jury on how the court would make such a determination based on the number of potential results the jury could have reached." (Appendix 3, p. 6)

On appeal, the Court of Appeals held that the District Court was not required to provide a de novo review of

the jury's special verdict answers. (Appendix 1, p. 8) But if the District Court had been required to do so, "it may be that the district court engaged in such review." (Appendix 1, p. 8, fn. 3)

With respect to its own obligations, the Court of Appeals noted that:

> "[T]he district court's factual determinations in this case involve the procedural issue of standing. . . . [E]ven in a first amendment case, factual determinations related to standing should be reviewed under the 'clearly erroneous' standard." (Appendix 1, p. 9)

Concluding that the District Court's findings were not clearly erroneous, the Court of Appeal affirmed the ruling on standing. (Appendix 1, pp. 9-11, 13)

> "Because Nor-West was not willing or financially able to compete with Continental, we find that Nor-West was not likely to benefit from the grant of a second franchise in this case, and therefore lacked standing." (Appendix 1, p. 14)

The Court of Appeals, however, did *not* address the jury instruction that Nor-West and Continental were both members of the class of persons known as cable television operators and were "similarly situated." (See Appendix 11, RT 2029-2030)

The $265,000.00 which Nor-West spent in seeking a franchise was deemed unrecoverable. (Appendix 1, p. 17)

To the Court of Appeals, Nor-West suffered no harm from the trial court's refusal to rule on which, if any, of the City's demands could be imposed on Nor-West:

> "Thus, the question of what system the City would have required Nor-West to build is beside the point, and Nor-West lacks standing even if the district court should have instructed the jury to determine what system the City should have required Nor-West to build." (Appendix 1, p. 20)

The Court of Appeals found no error in the District Court's having dismissed Continental as a defendant. Since Nor-West lacked standing to sue the City, "it also lacks standing to sue Continental." (Appendix 1, pp. 22-23)

In summary, after the jury was presented with special verdict questions without constitutional guidelines, neither the District Court nor the Court of Appeals independently reviewed the record to see whether sufficiently persuasive evidence existed to justify a denial of Nor-West's First Amendment rights. The absence of an independent review was especially troublesome since the jury apparently viewed the evidence contrary to the judge's instructions, i.e., without giving full effect to the City's admission that Nor-West and Continental were "similarly situated" members of the class of cable television operators.

REASONS FOR GRANTING THIS PETITION

This Court should grant Nor-West's petition for several inter-related reasons:

1. Based on extensive discovery proceedings and an eight week jury trial, the present case offers the necessary record to allow a formulation of national policy in an area where lower courts often have made questionable and inconsistent rulings.

Through extensive discovery proceedings and an eight week jury trial, the present record clearly depicts the stress in cable television dissemination between municipal franchising, technological innovations and First Amendment rights. As a result, this Court now has a

factual basis on which to analyze the problems of how a city's exercise of its regulatory powers inhibits the electronic press from contributing to the commerce of ideas. What this Court sought in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986), i.e., a fully developed record, has been established here. By utilizing these facts, this Court can provide authoritative guidance in an area of continuing tension between the exercise of municipal police powers and the enjoyment of First Amendment rights. Especially helpful is the jury's finding that the City's public utility facilities and rights of way were able, by reasonable rearrangement, to accommodate more than one cable television system.

Cable television systems have expanded so greatly in the past few years that an estimated 91 percent of American homes now have access to those services. Industry statistics indicate that 58% of households with television sets presently subscribe to cable services, representing a majority of the potential viewing audience. (See Paul Kagan Associates, Inc., The Kagan Cable TV Financial Databook, p. 10 (June, 1990).) What sets cable television apart from the other major forms of the media is its ability, with a multiplicity of channels, to transmit a choice of programs to its audience, including direct observation of governmental processes and decision-making. By turning to their home screens, interested citizens may observe governmental process in action. The camera eye revitalizes the concept of a town meeting where the citizenry makes its own judgments about its elected or appointed representatives.

This Court therefore must be aware of the danger in allowing city officials whose activities come under scrutiny to control which cable system will be allowed to

observe – or turn away from – public affairs. Examples of how different courts have construed their constitutional obligations are plentiful.[1] Synthesizing, modifying, approving or disapproving these decisions is a task which only this Court can accomplish.

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[1] *See Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir.1985), affirmed 476 U.S. 488 [a single cable franchising scheme violates the First Amendment if utility facilities can accommodate multiple systems]; *International Broadcasting Corp. v. City of Bismarck*, 697 F.Supp. 1094, 1097 (N.D. North Dakota 1987) [an exclusive grant of a cable television franchise to one applicant probably would have violated the other applicants' First Amendment free speech rights]; *Central Telecommunications v. TCI Cablevision*, 800 F.2d 711, 716, 717 (8th Cir. 1986) [changes in technology may require a different approach to franchising schemes; an applicant seeking an exclusive franchise had a protectable interest where the "natural monopoly" characteristics of the cable market justified the City in offering a de facto exclusive franchise to create competition for the market]; *Communications Systems, Inc. v. Danville, Ky.*, 880 F.2d 887, 892 (6th Cir. 1989) [based on state law grounds, the court recognized that where the market could not support two competing cable television companies, it was lawful to award only one non-exclusive franchise, leaving open the possibility of awarding additional franchises when appropriate]; *Warner Cable Communications v. City of Niceville*, 911 F.2d 634, 636-638 (11th Cir. 1990) [a cable television franchise holder has no First Amendment right to its original market, undiminished by competition from a city-owned system, although "the government may not speak so loudly as to make it impossible for other speakers to be heard by their audience"]; *Century Federal, Inc. v. City of Palo Alto, Cal.*, 648 F.Supp. 1465, 1467, 1471 (N.D. Cal. 1986) [the fact that the cable television market in a proposed service area is a natural monopoly does not justify greater governmental regulation of cable operators than would otherwise by allowed under the First Amendment; a monopoly franchise scheme is unconstitutional]; *Group*

(Continued on following page)

Both the trial and appellate courts declined to address these issues. However, if a company like Nor-West, with some $76,000,000.00 in net equity among its partners, which prosecuted this litigation through pretrial proceedings, multiple appeals and an eight week trial, can be held to lack standing at the end of trial, based upon verdicts entered in a constitutional vacuum, the litigation burden placed on a potential cable entrant is indeed extraordinary.

Five years have passed since this Court declined to resolve the monopoly cable franchising constitutional question due to a desire for a more fully developed factual record. In that five year period, no such case has been presented to this Court.

Nor-West suggests that this apparent calm conceals an ongoing crisis which is limiting competitive television services to the nation's viewing audience. Incumbent cable television operators, enjoying the benefits of a monopoly franchise system, profit from the restrictive

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(Continued from previous page)

W Cable, Inc. v. City of Santa Cruz, 669 F.Supp. 954, 958, 961 (N.D. Cal 1987) [the policy of granting only a monopoly cable television franchise violates the First Amendment; conditioning the award of a franchise on the provision of concessions also violates the First Amendment, except for proof of financial responsibility and imposition of reasonable administrative and use fees]; *Pacific West Cable Co. v. City of Sacramento, supra*, 672 F.Supp. at pp. 1334-35 [generally speaking, a government created monopoly of a particular medium of communication is antithetical to First Amendment principles; if competition is feasible and sustainable, the impact of selecting a single cable television service provider and excluding all others has an "extremely significant effect on expression"].

policies. Similarly, municipal authorities have no incentive to raise an anti-competitive issue. *Only* excluded cable television applicants have a need to bring these constitutional issues before the Court.

Due to the historical monopoly status of cable franchising, many existing ordinances include requirements paid for by the incumbent operator's monopoly profits. The harmful effect of these practices has been clearly identified:

> "[T]he municipality uses the monopoly status of the cable system to extract revenue from households in the franchise area. Because federal law prohibits direct payment of this revenue in the form of municipal franchise fees, the municipality receives the payment in the form of facilities.
>
> "Ironically, although much of the public concern regarding the abuse of monopoly market power has been directed at the private firm, it is often the municipalities, charged with regulating the industry, that have wielded the market power." (Webb, Economics of Cable Television 179-180 (1983))

A prospective cable operator, such as Nor-West, not only must challenge the constitutionality of the City's decision to issue only a single franchise, but also must challenge individual requirements before developing an economically viable project. This is the self-fulfilling aspect of the "natural monopoly" argument asserted by the City and other municipalities to support a single franchise scheme. (Of course, *any* industry would yield similar results were government to install a monopoly provider and "regulate" it to siphon off the resulting monopoly profits.)

Since prospective cable entrants understandably do not know which franchise requirements will and will not

be ultimately upheld as constitutional, the prospect of long and expensive litigation is particularly daunting.

If the decision below is permitted to stand, attempts to resolve these constitutional issues may be thwarted. A prospective cable entrant will not only have existing barriers to contend with, it will face the prospect of incurring substantial litigation costs, only to find itself barred from the marketplace because a jury concluded that the entrant was insincere.

> 2. Because Nor-West was denied standing to assert its First Amendment rights against prior restraint as the direct outcome of unreviewed jury findings, this case should determine a) what standard of proof must a First Amendment speaker satisfy before being allowed to assert his rights, b) what testimony about the impact of monopoly franchising on journalistic freedom is the jury entitled to hear, and c) what obligations, if any, does either the trial court or a reviewing court (or both) have to independently review the record to see whether clear and convincing evidence existed to justify a denial of those rights.

Through several misconceived rulings, the District Court and the Court of Appeals justified a prior restraint on Nor-West's exercise of its First Amendment rights without ever evaluating the constitutional support for those rulings. The harm which Nor-West suffered from the lower courts' rulings may be divided into three areas – i.e., unfair burden of proof, exclusion of expert testimony on First Amendment pitfalls which affect the profession of journalism as the result of municipal franchising, and application of the standing concept.

a. The Unfair Burden Of Proof: After the City claimed power to screen prospective cable operators and award a

franchise to the system which most appealed to the City's subjective interests, Nor-West brought the present litigation to argue that a First Amendment speaker need *not* satisfy every demand the City had imposed. Nor-West, of course, recognized that some municipal controls could well be appropriate. (*See United States v. O'Brian*, 391 U.S. 367, 376) But Nor-West, in its dual capacity as a First Amendment speaker and a commercial enterprise, had to know which restrictions were valid *before* Nor-West could commit its financial resources to any given blueprint.

Since the City had admitted – and the District Court had so instructed the jury – that Nor-West and Continental were "similarly situated" members of the class of cable television operators (see Appendix 11, RT 2029-2030), Nor-West's need for early guidance was clear. Nor-West could marshall enough assets to enter the cable television field – but needed direction before completing its plans for any particular system.

Had the court ruled that the City's form of licensing of the press was an illegal prior restraint and declared a right of access to the market, subject to lawful police power regulation, Nor-West could have chosen to accept the approved regulations or to test them in a lawful way without risking the denial of its constitutional rights to speak and to publish.

Yet through the discovery orders, the District Court misused an otherwise neutral procedure. By preventing Nor-West's technical experts from developing plans which were based on realistic circumstances, i.e., on a list of judicially acceptable municipal demands or even a definitive list of the City's defenses, the court undercut Nor-West's commitment to service. (Would the periodic entanglement of tree roots and underground cables, for

example, be a proper basis for denying Nor-West a franchise?) Placed in that informational void, Nor-West's witnesses were unable to persuade the jury that Nor-West had the economic strength and technological skills to deserve a franchise. Nor-West's experts necessarily presented tentative and incomplete testimony.

The instructions let the jury decide what system Nor-West would have built – but included questions on whether the City had a substantial interest in "cable television service to all St. Paul residents" and "some cable television channels for public, educational and governmental access uses." (Appendix 11, RT 5751, 5753-54; Appendix 2, pp. 3-4) Whether universal service and public access requirements were constitutional or unconstitutional was left unsettled. Nor-West had to persuade the jury that the company could and would proceed to execute its plans, even though no one knew how small or how inexpensive a system would meet constitutional guidelines.

Predictably, the City could – and did – argue that the present lawsuit was a "complete fairly tale." (Appendix 11, RT 5523-25, 5531, 5542-43, 5546-48, 5607) But while cries for free expression may be fairy tales in other parts of the world, Nor-West's plea for First Amendment relief deserves a more appropriate response than the lower courts have provided.

Presumably assuming that the requirements for universal service, public access programming and other guidelines were constitutional, the jury never determined whether Nor-West could construct a competitive system over part of the City or a system without subsidizing public access programming for others' use. Quite simply, Nor-West was unfairly put in the position of playing a

guessing game with its constitutional rights. Either it guessed correctly about constitutionality, tailoring its "plans" to match precisely that end result, or Nor-West sacrificed its free speech rights.

Faced with a related situation eleven years ago, a District Court observed that:

> "It is not characteristic of utility regulation for the regulating authority to negotiate with those to be regulated and then formulate the final policy by exercising legislative power through an offer and acceptance mechanism. It might well be a different case if Boulder had enacted an ordinance articulating qualifying criteria for cable companies to do business in the City, with such other regulations as the City government might believe to be necessary and proper in the exercise of police power, and then to confront the contention that such an ordinance had an anticompetitive effect." (*Community Communications v. City of Boulder*, 485 F.Supp. 1035, 1039 (D. Colo. 1980), *reversed* 630 F.2d 704 (10th Cir. 1980), *reversed* 455 U.S. 40 (1982))

The *Boulder* court anticipated Nor-West's difficulties but felt that the "potential problems in this developing situation" were not then ripe for decision. Nevertheless:

> "The question, of course, is what are the limits of that authority? If controlling content of the programs is beyond those limits, is it different, either in degree or in kind, for the City government to prescribe the number, variety, and scope of programming and services to be offered? And, is it appropriate for the City administration to say that the acceptablilty of a cable company rests on its willingness to contribute free services to that government or to such institutions or groups as may be considered to be in need of benefit or reward? Stated bluntly, may the City exact tribute for its favors?" (*Community Communications v. City of Boulder, supra*, 485 F.Supp. at p. 1040)

The record in the present case presents a full-bodied opportunity for this Court to resolve the questions which have long-since passed the potential stage and have become actual, immediate, costly and troublesome.

b. *Testimony About Journalistic Freedom:*

Nor-West offered an expert witness to testify that allowing a city to practice monopoly franchising necessarily restricts journalistic freedoms. The District Court, however, excluded that testimony. (See Appendix 11, RT 854-57, 861-62, 869, 930-31, 2002-05, 5360-65, 5367, 5497-98) This exclusion left the jury ignorant of how would-be monopolists seek benefits from elected officials anxious for favorable publicity.

c. *Standing:*

The District Court and the Court of Appeals left substantive issues unresolved because the lower courts viewed the jury's special verdicts as a factual mandate for depriving Nor-West of its standing to assert First Amendment rights.

Article III gives federal courts jurisdiction only over "cases" and "controversies." Before a court may consider the merits of a legal claim, the person seeking relief must establish the requisite standing to sue. The standing concept, however, has been elusive, incapable of precise definition. What appears clear is that the litigant must have suffered an injury "in fact," requiring a "concrete," "distinct," "palpable," "actual" or "iminent" aspect. The injury must fairly be traceable to the challenged action and must likely be capable of redress by a favorable court decision. The plaintiff must show an essential dimension of specificity which informs

judicial decision making, not express a mere abstract concern about a problem of general interest.[2]

Measured against these guidelines, Nor-West qualifies for standing. When the City issued an RFP, it set the ground rules by which an applicant could compete for a cable franchise. Nor-West spent $265,000.00 in complying with the rules and obtaining favorable City Council action (subject to the mayor's later veto). By the RFP's own terms, the City's allowing Nor-West to compete established that the company satisfied all relevant criteria. The City expressly admitted – and the District Court so instructed the jury – that Nor-West and Continental were "similarly situated" members of the class of cable television operators.

For purposes of eventual standing in court, Nor-West thus established its participation in television franchising "in fact," an interest which was "concrete," "distinct," "palpable," "actual" and "imminent," rather than an abstract concern about a matter of general interest.

After being rejected, Nor-West applied for a non-exclusive franchise but the City refused to grant permission because "adversarial conditions" existed, i.e., Nor-West was seeking to vindicate its First Amendment interests in court. Few injuries could be more concrete than punishment for exercising constitutional rights. These

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[2] (*See Whitmore v. Arkansas*, 495 U.S. ___, ___, 109 L.Ed.2d 135, 144, 149 (1990); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United For Separation Of Church And State*, 454 U.S. 464, 471 (1982); *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 260 (1977); *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 683; *cf. Whitmore v. Arkansas, supra*, 495 U.S. at p. ___, 109 L.Ed.2d at p. 147).

concrete injuries were fairly traceable – incontestably traceable! – to the City's unlawful actions, i.e.: The City established unconstitutional RFP procedures which restricted First Amendment speakers to a single franchise and refused to grant a competing franchise because Nor-West had exercised its First Amendment right to petition the government by instituting federal court litigation.

Through a favorable court decision, Nor-West's injuries most likely would be redressed. Nor-West could recover the $265,000.00 spent in complying with the franchising process; could recover damages from the City and Continental; and would be relieved of the prior restraints which prevented it from exercising its First Amendment rights.

The Prejudice Inherent In Judicial Reliance On The Jury's Special Verdict

Although the District Court recognized that the lack of legal precedents created continuing obstacles, the court brushed aside Nor-West's contention that jury findings were *not* binding if the findings impaired First Amendment rights. The Court of Appeals compounded the error by improperly distinguishing between First Amendment "substantive" and "procedural" issues. Nor-West realizes that an aggrieved party may *not* acquire standing just because no one else could acquire standing. (*See Schlesinger v. Reservists Committee To Stop The War,* 418 U.S. 208, 227 (1974)) What Nor-West contends is that it earned a place as a First Amendment speaker by satisfying rules the City itself had set to identify eligible cable companies. Allowing a jury to make the determinations which justify prior restraints places the First Amendment in an elastic frame. "Uncertainty as to the scope of the constitutional protection can only dissuade protected speech – the more elusive the standard, the less protection it

affords." (*Harte-Hanks v. Connaughton*, 491 U.S. ___, ___, 105 L.Ed.2d 562, 588 (1989))

No matter how fair, no matter how conscientious, no matter how open-minded six randomly-chosen citizens may be, they are inappropriate arbiters of our nation's organic law. They may *not* determine constitutional questions when they have been kept ignorant of what they really are deciding. Without guidelines from the court on what burdens constitutionally may be imposed on a First Amendment speaker, and what burdens are forbidden, the jurors have been set adrift in their search for facts.

As this Court declared in *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501:

> "[T]he rule of independent review [in First Amendment cases] assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge."

See also Harte-Hanks, Inc. v. Connaughton, supra, 491 U.S. at pp. ___, 105 L.Ed.2d at pp. 589, 592 [In determining whether the constitutional standard has been met, the reviewing court must consider the factual record in full; here, the evidence in the record, when reviewed in its entirety, was unmistakably sufficient to support a finding of actual malice]; *Houston v. Hill*, 482 U.S. 451, 457, fn. 6 ["An independent review of the record is appropriate where the activity in question is arguably protected by the Constitution"]; *Tavoulareas v. Piro*, 817 F.2d 762, 776 (DC Cir. en banc 1987), *cert. denied* 484 U.S. 870 (1987) [The correct standard of review is that: "Specifically, by virtue of the First Amendment nature of this litigation, the jury verdict must be measured, on the basis on an independent examination, against the heavy burden of proof imposed on a plaintiff who is a public figure"]).

To Nor-West's prejudice, however, neither the District Court nor the Court of Appeals independently reviewed the factual material which produced such constitutional impact.

This Court now has the opportunity to help lower courts navigate through what *Tavoulareas v. Piro, supra,* 817 F.2d at p. 777, called "uncharted waters":

> "The somewhat murky dispute that has consumed this litigation in its later phases is whether *Bose* went further and sanctioned independent review as to findings of underlying facts, evaluations of credibility, and the drawing of inferences. It is this issue – the existence and application of this possible additional aspect of *Bose* – that we believe, upon reflection, we need not decide."

See also Warner Cable Communications v. City of Niceville, supra, 911 F.2d at p. 637 [After the opinion in *City of Los Angeles v. Preferred Communications, Inc.*, "the full contours of a cable operator's first amendment right remain unshaped"].

Yet for Nor-West, a decision on those unresolved questions is the only means of assuring proper respect for First Amendment rights.

> 3. Where a franchise holder formally had intervened in the litigation between Nor-West and the City and had taken part in all pretrial and discovery procedures, this Court should rule on whether the franchisee may withdraw from the case on the eve of trial, over objections that the franchisee was seeking to escape from responsibility for its wrongful activities.

The Court of Appeals has declared that. "If, as we believe, Nor-West lacks standing to sue the City, it also lacks standing to sue Continental." (Appendix 1, pp. 22-23) But since Nor-West believes that it *does* have the requisite standing, this Court (or, on remand, a lower court) should determine whether the District Court properly allowed

Continental to avoid responsibility for its actions after Continental had voluntarily intervened as a party, participated in all pretrial and discovery matters, evaluated its interests, and decided to withdraw as a potentially liable conspirator.

Since Nor-West's amended complaint sufficiently identified Continental as being answerable in damages and since Continental had become the real party in interest, the trial court should have forbidden Continental from withdrawing. (Appendix 10) Continental should answer on the merits.

CONCLUSION

As a governing body, the City Council of St. Paul once voted to award Nor-West Cable Communications Partnership a franchise for cable television operations. After being named as a defendant in the litigation which Nor-West brought on First Amendment grounds, St. Paul refused to issue a franchise to Nor-West because Nor-West had sought judicial protection against prior restraint.

Neither the District Court nor the Court of Appeals in this case independently reviewed the record to determine that the jury's special verdicts contained clear and convincing evidence that Nor-West should be denied standing to assert its rights as a First Amendment speaker.

This Court should reverse the judgment against Nor-West and remand this matter for an independent review of the evidence and for all related relief.

Dated: April 22, 1991

Respectfully submitted,

HAROLD R. FARROW
Attorney for Petitioners

No. _____

In The

Supreme Court of the United States

October Term, 1991

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP,

Petitioner,

vs.

CITY OF ST. PAUL and CONTINENTAL CABLEVISION OF ST. PAUL, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX 1

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5184

Nor-West Cable Communications Partnership, a general partnership,	*	
Appellant,	*	Appeal from the United States District Court for the District of Minnesota
v.	*	
City of St. Paul, A City of the First Class,	*	
Appellee,	*	
and	*	
Continental Cablevision of St. Paul, Inc.,	*	
Intervenor-Defendant Below,	*	
Appellee.	*	

Submitted: May 14, 1990

Filed: January 25, 1991

Before McMILLIAN, Circuit, Judge,
HEANEY, Senior Circuit Judge,
and ARNOLD, Circuit Judge.

McMILLIAN, Circuit Judge.

Nor-West Cable Communications Partnership ("Nor-West") appeals a judgment of the United States District Court for the District of Minnesota.[1] *See Nor-West Cable Communications Partnership v. City of St. Paul*, No. 3-83-Civ. 1228 (D. Minn. Sept. 1, 1988) (order for judgment) (*Nor-West I*). On appeal, Nor-West argues that the district court erred in upholding the jury's answers to various "special verdict" questions and in denying Nor-West's motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial. For the reasons stated below, we affirm.

I. Facts

In 1979, the City of St. Paul, Minnesota, issued a "request for proposals" (RFP) to companies interested in providing a cable television service to St. Paul. Although several companies filed proposals, the City decided to operate its own cable system. After the City's "municipal ownership" plan was rejected in a referendum, the St. Paul City Council voted to award a single, non-exclusive franchise to a private cable operator, and a new RFP was issued. Numerous companies filed proposals, including Continental Cablevision of St. Paul, Inc. ("Continental"), and Nor-West. The City Council passed a resolution awarding the franchise to Nor-West, but the Mayor of St. Paul vetoed the resolution, and the City Council then

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[1] The Honorable Donald D. Alsop, Chief Judge, United States District Court for the District of Minnesota.

awarded the franchise to Continental. This decision was affirmed by the Minnesota Cable Communications Board and by the Minnesota Supreme Court. *See Cable Communications Board v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658 (Minn. 1984).

On September 2, 1983, Nor-West filed the present lawsuit against Continental and the City (collectively "defendants"), alleging violations of due process, equal protection, the first amendment, and the Sherman Antitrust Act, 15 U.S.C. §§1, 2 (1988), as well as pendant state claims. Shortly thereafter, Nor-West's counsel requested that the City award a second, competing franchise to Nor-West. Defendants moved to dismiss, and the district court granted the motion. We reversed and remanded, ordering the district court to reconsider Nor-West's claims in light of a recent Supreme Court case. *See Nor-West Cable Communications v. City of St. Paul*, 802 F.2d 462 (8th Cir. 1986) (unpublished) (reversing and remanding case to district court), *citing City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (requiring "thoroughly developed record" in first amendment cases).

On remand, the district court proceeded to trial on Nor-West's first amendment and equal protection claims, and dismissed Nor-West's other claims. After an eight-week trial, the district court submitted the case to the jury on special verdicts. The jury found that Nor-West spent $265,000.00 in seeking the cable television franchise, but also found that Nor-West was never willing, nor technically or financially able to build a competitive cable system, and that it was therefore not damaged by the City's failure to award it a second cable franchise.

In *Nor-West I*, the district court adopted the jury's factual findings, holding that it was both "bound [and] . . . chooses to be bound by the jury's findings." Slip op. at 6. Specifically, the district court held, based on Special Verdicts Nos. 5-7, *id.* at 11, that Nor-West was not willing or able to build a competitive cable system. The district court went on to hold that because Nor-West was unwilling and unable to compete, it lacked standing to challenge Continentals's cable monopoly. The district court further held that Nor-West was not entitled to damages for its expenditures in pursuit of the cable monopoly, because "unsuccessful bidders are not entitled to recover damages." *Id.* at 9. The district court also dismissed Continental as a defendant, on the basis that "[n]o injunctive or monetary relief was sought from Continental." *Id.* at 1 n.1.

Nor-West then moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The district court denied Nor-West's motion. *See Nor-West Cable Communications Partnership v. City of St. Paul*, No. 3-83-Civ. 1228 (D. Minn. Feb. 27, 1989) (order) (*Nor-West II*). This appeal followed.

II. Issues

On appeal, Nor-West contends that: (1) the district court erred in holding that Nor-West lacked standing to sue, (2) even if Nor-West lacked standing to challenge the City's refusal to grant a competitive franchise, it had standing to request damages for the $265,000.00 it spent in pursuit of a cable monopoly, (3) the district court's pretrial discovery order erroneously limited Nor-West's right

to present expert witnesses, (4) the district court submitted numerous erroneous instructions and special verdicts to the jury, (5) the district court erroneously excluded certain evidence, and (6) that if damages should have been awarded against the City, Continental should also be liable for damages. Each of these arguments will be addressed in turn.

A. Standing

The jury answered Special Verdicts Nos. 1-3 and Nos. 5-7 as follows:

1. Did Nor-West have the financial ability necessary to design, construct and operate the cable television system which Nor-West requested permission to build after August 2, 1983, in competition with Continental Cablevision in St. Paul?

NO

2. Was Nor-West capable of obtaining and providing the technical capability necessary to design, construct and operate the cable television system which Nor-West requested permission to build after August 2, 1983, in competition with Continental Cablevision in St. Paul?

NO

3. If Nor-West had been given the opportunity to build the cable television system it requested permission to build after August 2, 1983, in competition with Continental Cablevision, would Nor-West have built the system?

NO

5. At this time, does Nor-West have the financial ability necessary to design, construct and operate the cable television system it has requested permission to build in competition with Continental Cablevision in St. Paul?

NO

6. At this time, is Nor-West capable of obtaining and providing the technical capability necessary to design, construct and operate the cable television system it has requested permission to build in competition with Continental Cablevision in St. Paul?

NO

7. If Nor-West were given the opportunity at this time to build the cable television system it has requested permission to build in competition with Continental Cablevision in St. Paul, would Nor-West build such a system?

NO

Nor-West I, slip op. at 1-2. After trial, Nor-West asserted that the jury's answers were merely advisory. The district court rejected this view, holding that "the court is bound by the jury's findings. Further, the court chooses to be bound by the jury's findings." *Id.* at 6. Based on the jury's findings that Nor-West was not "ready, willing and able to operate a [competitive] cable television system," *id.* at 8, the district court held that Nor-West did not have standing to sue. In denying Nor-West's motion for judgment n.o.v. or a new trial, the district court reiterated its view that Nor-West lacked standing. *See Nor-West II*, slip op. at 4-9.

On appeal, Nor-West argues that (1) the district court failed to independently review the jury's findings, (2) we must review the district court's findings *de novo*, (3) the district court erred in finding that Nor-West was neither able nor willing to build or operate a competitive cable system, (4) Nor-West has standing because it was denied the opportunity to compete, even if it were neither able nor willing to do so, (5) post-trial determinations of standing are impermissible, and (6) even if Nor-West has suffered no injury itself, it has standing to sue on behalf of St. Paul cable television consumers, who were allegedly injured by the absence of competition in St. Paul. Each of these issues will be addressed below.

1. District Court Review of Jury Findings

Where a case has been submitted to the jury on special verdicts pursuant to Fed. R. Civ. P. 49(a), the jury's findings are usually binding on the district court unless they are against the weight of the evidence. *See, e.g., Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385, 388 (8th Cir. 1984) (affirming district court rejection of jury's special verdict as "agaisnt the great weight of the evidence"). Nor-West contends, however, that in cases involving the first amendment, the district court must review the jury's findings *de novo* and failed to do so in the present case.

In support of the first proposition, Nor-West relies on the case of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (*Bose*). In *Bose*, the defendant allegedly made false statements about loudspeakers manufactured by the plaintiff, and the plaintiff filed suit for

product disparagement. The district court entered judgment for the plaintiff after a bench trial, holding that the plaintiff had proven, *inter alia*, that the defendant had published its statements with "actual malice."[2] The First Circuit reversed, holding that its review of the district court's "actual malice" determination was not limited to the "clearly erroneous" standard traditionally governing factual determinations in bench trials. The Supreme Court agreed, holding that:

> the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice. . . . Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.

Id. at 514. Thus, *Bose* stands for the proposition that appellate courts must review a district court's finding of "acutal malice" *de novo*. This rule also applies to other "cases involving restriction on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech," *id.* at 503, even if relevant issues were resolved by a jury rather than a judge. *Id.* at 508-09 n.27.

Nor-West argues that *Bose* required the district court "to independently review the evidence on dispositive

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[2] "Acutal malice" has been defined as "knowledge that-[a statement] was false or . . . reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

constitutional facts." Brief for Appellant at 33. Although *Bose* requires special scrutiny of jury verdicts, 466 U.S. at 510 n.29, it does not suggest that the district court rather than the court of appeals should review such verdicts *de novo*. Thus, Nor-West's argument is incorrect, and we find that the district court was not required to review the jury's special verdict answers *de novo*.[3]

2. Standard of Review on Appeal

As a rule, factual determinations relating to standing must be upheld on appeal unless they are clearly erroneous. *See Pulido v. Bennett*, 848 F.2d 880, 888 (8th Cir.), *rev'd on other grounds on rehearing*, 860 F.2d 296 (8th Cir. 1988); *see also Hope, Inc. v. County of DuPage*, 738 F.2d 797, 803 (7th Cir. 1984) (applying "clearly erroneous" rule to standing determination in case involving fourteenth amendment claim). On the other hand, it could be argued that *Bose* requires *de novo* review where, as here, the plaintiff's substantive claim arises under the first amendment.

Indeed, *Bose* clearly holds that certain first amendment issues in addition to "acutal malice" must be

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[3] Even if *Bose* did require *de novo* review of the jury's findings, it may be that the district court engaged in such review. The district court stated that even if it was not "bound by the jury's findings . . . the court *chooses* to be bound the by the jury's findings." *Nor-West I*, slip op. at 6 (emphasis added). The district court later held that even if *Bose* required it to "independently review the record, the court . . . did so by specifically choosing to adopt the findings of the jury as the facts in this action." *Nor-West II*, slip op. at 5.

reviewed *de novo* on appeal. *See Bose*, 466 U.S. at 504-08 (requiring independent review as to whether speech falls in "unprotected category" such as fighting words, incitement of lawless action, obscenity, and child pornography). *See also, Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2695 (1989) (applying *Bose* to libel action) (*Harte-Hanks*); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (requiring independent review as to whether an alleged breach of the peace protected by first amendment); *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 897 (D.C. Cir. 1984) (requiring independent review as to whether speech deceptive and therefore unprotected).

However, *Bose* and similar cases involve substantive determinations as to whether the plaintiff's speech is protected by the first amendment. By contrast, the district court's factual determinations in this case involve the procedural issue of standing. Accordingly, we hold that *Bose* is distinguishable and find that even in a first amendment case, factual determinations related to standing should be reviewed under the "clearly erroneous" standard.

3. Were the District Court's Findings Clearly Erroneous?

Nor-West next argues that the district court's findings were clearly erroneous as to whether Nor-West is or was financially able to build a competitive cable system, intends to build a competitive system, and is or was technically able to do so.

a. Financial Ability

Nor-West argues that it is (and was in 1983) capable of financing a competitive cable system and that the district court's holding to the contrary was clearly erroneous. Nor-West notes that its partners had a combined net worth of $76 million, including $10 million in cash. Although some of Nor-West's partners have dropped out, Nor-West's net worth is still $31 million, and one of Nor-West's partners "testified he could obtain a loan commitment if Nor-West were given a [competitive] franchise." Brief of Appellant at 19. Nor-West also notes that banks in other cities have been willing to finance cable systems and that it could build a system even more cheaply if the City allowed it to build a smaller system than that mandated by the City's RFP.

On the other hand, the City notes that Nor-West's original financing commitment lapsed in 1983 and that Nor-West has not yet obtained a financing commitment for a competitive cable system. The City's expert testified that Nor-West would not have obtained a loan commitment even if "Nor-West had a connection with a major cable company or if the partnership had substantial personal assets," Brief of Appellee City of St. Paul at 12 n.21 ("City Brief"). The City also relies on the testimony of Henry Harris, whose cable company (Metrovision) had originally contracted to operate a cable system for Nor-West. Harris testified that he would not be interested in operating a competitive cable system in St. Paul because such a project would be as "doomed to failure no matter how good a management you threw at me" and likened operation of a competitive system to being "lead pilot in

a Kamikaze plane." *Id.* at 13. Finally, numerous experts testified that "there was insufficient demand for cable television in St. Paul to sustain more than one operator," *id.* at 13, and that Nor-West would have lost money. *Id.* at 14. In response, Nor-West's experts testified that it could compete with Continental head-to-head.

Based upon our review of the evidence, we find that even if Nor-West had been able to obtain a bank loan to finance a competitive cable system, reasonable people could disagree as to whether it would have been able to operate a competitive system profitably. Accordingly, we hold that the district court's finding that Nor-West was never financially able to compete with Continental was not clearly erroneous.

b. Intent

Nor-West also contests the jurys' findings that it never intended to build a second cable system in St. Paul. Nor-West contends that its expenditure of over $1 5 million in this litigation proves that it intended to build a competitive cable system, Brief of Appellant at 35 n.106. On the other hand, the City notes that the Nor-West partners did not investigate the possibility of building a competitive system until the present litigation began, and that the partners were "unable to articulate what Nor-West was ready, willing and able to build." Brief for Appellee City of St. Paul at 11.

Reasonable people could disagree as to the credibility of Nor-West's partners' testimony that they intended to build a competitive cable system. Accordingly, we hold

that the district court's finding that Nor-West "never intended to design, construct, and operate a cable television system in St. Paul," *Nor-West I*, slip op. at 7, was not clearly erroneous. *See Harte-Hanks*, 109 S. Ct. at 2696 (even in first amendment cases, credibility determinations are reviewable under the clearly erroneous standard). We therefore need not address the question of whether Nor-West had the technical capacity to build a competitive cable system in St. Paul.

4. Do Financial Capability and Intent Matter?

Nor-West next argues that even if it lacked either the financial capability or the intent to compete with Continental, it has standing to sue, because "[i]t has been denied the *opportunity* to speak and publish. That denial alone is a judicially recognized injury." Brief for Appellant at 30 (emphasis in original). In support of this view, Nor-West relies primarily on the cases of *City of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (*Arlington Heights*) and *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (*Bakke*).[4]

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[4] Nor-West cites numerous other decisions in support of the proposition that the likelihood of actual economic injury may not be considered in ascertaining whether it has standing to sue. *See* Brief for Appellant at 32 & n.99. Some of the cases cited by Nor-West, however, simply do not involve the standing doctrine. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (denial of parade permit unconstitutional where officials not guided by any standards); *Louisiana v. United States*, 380 U.S. 145, 152-53 (1965) (literacy test unconstitutional if arbitrarily administered); *Cox v. Louisiana*, 379

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In *Bakke*, the plaintiff, an unsuccessful white applicant to a medical school, challenged a "special admissions" program setting aside 16 of 100 places for nonwhite applicants. 438 U.S. at 275. Several *amici* alleged that the plaintiff lacked standing, "arguing that he never showed that his injury-exclusion from the Medical School – will be redressed by a favorable decision." *Id.* at 280-81 n.14. The Supreme Court disagreed, holding that:

> even if Bakke had been unable to prove that he would have been admitted in the absence of a special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is *likely to be redressed* by favorable decision of his claim. The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in his class, simply because of his race.

Id. (citations omitted) (emphasis added). Thus, it could be argued that *Bakke* is on point because it defines a "likelihood that plaintiff be redressed" as a likelihood that the plaintiff be allowed to compete, rather than a likelihood that the plaintiff be able to succeed.

The opportunity to compete and the opportunity to prevail, however, are not wholly unrelated. For instance, in *Doherty v. Rutgers School of Law-Newark*, 651 F.2d 893,

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U.S. 559 (1965) (conviction for breach of peace violated due process when the defendant followed official instructions); *Staub v. Baxley*, 355 U.S. 313, 332 (1958) (officials may not be allowed standardless discretion to grant or deny permits); *Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (same).

902 (3d Cir. 1981), as in *Bakke*, a white applicant challenged a graduate school's admissions program. The school argued that the applicant lacked standing to sue, because he "did not possess the qualifications to have been admitted in the absence of the minority student program he challenges." *Id.* at 895. In response, the applicant relied on *Bakke*. The district court granted the school's motion to dismiss and the Third Circuit affirmed, and interpreted *Bakke* as holding that even though an unsuccessful applicant need not show that he or she "would have been *admitted* in the absence of the challenged discriminatory program," he or she still must show that "there was a chance of successful admission had s/he not been prohibited from competing for all the seats." *Id.* at 902 (emphasis in original). The court went on to hold that *Bakke* was distinguishable, because the plaintiff "did not meet the criteria needed for acceptance for any of the seats at Rutgers Law School" and a favorable holding would not "substantially increase [the plaintiff's] chances for admission." *Id.*

In sum, *Doherty* stands for the proposition that even under *Bakke*, a plaintiff does not have standing unless he or she would have had a "realistic chance," *id.* of some benefit in the absence of the defendant's constitutional violations. In this case, Nor-West apparently did not have a chance of successfully competing with Continental. Thus, *Bakke*, is distinguishable, and *Doherty* is on point.

For the same reason, *Arlington Heights* and other cases cited by Nor-West are distinguishable. In *Arlington Heights*, a non-profit housing developer contracted to purchase a tract of land in order build racially integrated low-income housing. The developer's contract, however,

was contingent upon securing rezoning from the municipality in which the land was located. After the municipality denied rezoning, the developer filed a suit alleging unconstitutional racial discrimination. The municipality argued that the developer lacked standing to sue, because even if the municipality rezoned the property at issue, the developer "would still have to secure financing, qualify for federal subsidies, and carry through with construction." *Arlington Heights*, 429 U.S. at 261. The Supreme Court disagreed, because the developer had "shown an injury to itself that is '*likely* to be redressed by a favorable decision.' " *Id.* at 262, *quoting Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976) (emphasis added). *See also Bryant v. Yellen*, 447 U.S. 352, 368 (1980) (standing exists where it was "likely," even if uncertain, that intervenors would benefit from favorable verdict); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74-77 (1978) (affirming district court's finding of standing where the defendant's conduct caused "substantial likelihood" of injury to the plaintiffs); *cf.* L. Tribe, American Constitutional Law, § 3-18, at 132 (2d ed. 1988) (citing *Arlington Heights* in support of proposition that standing exists if the plaintiff's "transaction or project is demonstrably prevented by *nothing but* a challenged restriction") (emphasis added).

Because Nor-West was not willing or financially able to compete with Continental, we find that Nor-West was not likely to benefit from the grant of a second franchise in this case, and therefore lacked standing. Thus, *Arlington Heights*, like *Bakke*, is distinguishable.

Accordingly, we reject Nor-West's claim that it has standing because it was denied the opportunity to compete against Continental.

5. Can Standing Be Determined After a Jury Verdict?

Nor-West next argues that "[t]o deny standing after a full adversarial trial, moreover, defeats the basic policies underlying standing." Appellant's Opening Brief at 31. In support of this proposition, Nor-West cites *Thurston v. Dekle*, 531 F.2d 1264, 1270-71 (5th Cir. 1976) (*Thurston*), *vacated on other grounds*, 438 U.S. 901 (1978), and 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, Jurisdiction 2d § 3531.15 at 105 (2d ed. 1984) ("Wright & Miller").

The Wright & Miller treatise does not support Nor-West's argument. These commentators state that:

> [i]f the case survives to trial, the burden of establishing standing remains with the plaintiff. It *may* be possible to arrange the trial to present standing issues first, so that undue waste is avoided if the case must dismissed. . . . After a trial, the court of appeals reviews the matter [of standing] on the entire record, extending appropriate deference to the findings of the trial court.

Wright & Miller § 3531.15, at 104-05 (emphasis added). Thus, the Wright & Miller treatise clearly suggests that the issue of standing may be resolved at trial, and Nor-West's representation to the contrary is incorrect.

In *Thurston*, a class of city employees alleged that the city's procedures for dismissal were constitutionally inadequate. After the district court entered judgment for the plaintiff, a Fifth Circuit decision deprived the class representative of standing. The Fifth Circuit nevertheless decided to reach the merits, holding that:

> [u]nder the unique facts of this case, we hold that where the purpose of the standing requirement has been fulfilled by the presence of an adversary context which has remained concrete throughout the entire process and where standing was subsequently determined not to exist because of a change in law affecting subject matter jurisdiction, this court should reach the merits.

Thurston, 531 F.2d at 1271. Because Nor-West's standing has not been affected by decisions issued while the present case was on appeal, *Thurston* is obviously not on point.

Accordingly, we hold that the district court's decision to decide the question of standing at trial was not reversible error.

6. Third-Party Standing

Finally, Nor-West argues that even if it lacked standing in its own right, it should be allowed to vindicate the rights of St. Paul cable television consumers to the benefits of competition, or of the threat of competition.

If, as the district court found, Nor-West was not able or willing to compete with Continental, St. Paul cable television consumers obviously would not have experienced either the reality or the possibility of competition. It follows that if Nor-West does not have standing to sue on its own behalf, it also does not have standing to sue on consumers' behalf.[5]

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[5] We accordingly decline to address the City's arguments that (1) the issue of third-party standing was not raised

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Accordingly, we hold that the district court's endorsement of the jury's special verdict answers, and its holding the Nor-West lacked standing to sue, was correct.

B. Damages for Pursuit of a Monopoly

Special Verdict No. 10 asked the jury "[w]hat sum of money did Nor-West expend in attempting to obtain a cable franchise from the City of St. Paul in 1982-83?" *Nor-West I*, slip op. at 3. The jury answered that Nor-West had spent $265,000.00. Nor-West accordingly claims that it was entitled to this amount as damages. The district court rejected Nor-West's claim, because it "would only award this amount if, in fact, the Request for Proposal ordinance was found to be unconstitutional. As a general rule, unsuccessful bidders are not entitled to recover damages . . . [thus] plaintiffs lack standing," *Nor-West I*, slip op. at 9.

The City argues that Nor-West's expenditures in 1982-83 relate not to Nor-West's attempts to obtain a second cable franchise to compete with Continental, but to its earlier attempts to obtain a cable monopoly from the City of St. Paul. However, Nor-West explicitly rejects the City's contention that Nor-West "sought the invalidation of Continental's franchise and the issuance of *the* franchise to itself," Reply Brief for Appellant at 2 (emphasis added), *quoting* Brief for Appellee City of St. Paul at 8. Indeed, Nor-West claims that its complaint and

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previously, and (2) even those who seek to assert the rights of third parties must have standing to sue on their own.

later actions "do not support the conclusion that Nor-West was actually seeking an exclusive franchise." Reply Brief for Appellant at 3, and argues that such cable monopolies are unconstitutional. If Nor-West does not request damages for the denial of a cable monopoly, Nor-West cannot now obtain damages on that basis.

Accordingly, we find that Nor-West cannot recover money spent before it decided to compete with Continental instead of supplanting it as a cable monopolist.[6]

C. Discovery Order

Under Fed. R. Civ. P. 16, district judges and magistrate judges may hold pretrial conferences and issue pretrial orders in order to expedite pending litigation. Pretrial orders may address, *inter alia*, "the identification of witnesses and documents." Fed. R. Civ. P. 16(c)(5).

In January 1987, the magistrate judge[7] issued a pretrial order which, *inter alia*, required Nor-West to disclose the identity of its expert witnesses and the nature of their testimony a month before defendants' experts did so, and required Nor-West's experts to "have finally formulated opinions" a month before defendants' experts were required to do so. The district court summarily affirmed the magistrate's order.

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[6] We therefore decline to address the City's argument that Nor-West is barred from recovering damages under state law.

[7] Janice M. Symchych, United States Magistrate Judge for the District of Minnesota.

On appeal, Nor-West argues that the district court abused its discretion by requiring Nor-West to explain its experts' testimony first. Nor-West reasons that it should not have had to guess what sort of cable system if would have to be able to build in order to have standing, and that the City had the burden of proving its defenses. These considerations, if dispositive, would presumably bar even an order requiring a simultaneous exchange of witnesses' names, because the question of what type of system Nor-West allegedly intended to build was not addressed until trial. *See Nor-West II*, slip op. at 5 ("the kind of system which the plaintiff sought to build was for the jury itself to decide").

Ordinarily, pretrial orders require the parties to list their witnesses simultaneously. *See, e.g., Patterson v. F.W. Woolworth Co.*, 786 F.2d 874, 879 (8th Cir. 1986) (district court "required all parties to file statements concerning the anticipated testimony of expert witnesses by [same date]"); *Schooley v. Kennedy*, 712 F.2d 372, 373 (8th Cir. 1983) ("the district court filed a pretrial order which included the requirements that ten days prior to trial the parties submit a proposed list of witnesses").

Because a "simultaneous witnesses" pretrial order would not have given Nor-West any more notice of defendants' theories than the order actually issued, we hold that Nor-West was not prejudiced by the district court's decision to require Nor-West to list its witnesses first. Even if the pretrial order had been prejudicial, it was not reversible error. The question of what sort of system the City could have required Nor-West to build is not dispositive if, as the jury found, Nor-West did not intend to build a competitive cable television system and

was unable to operate "the cable television system it has requested permission to build," *Nor-West I*, slip op. at 2.

D. Special Verdicts and Jury Instructions

Nor-West next challenges the district court's special verdicts and jury instructions, on the grounds that (1) the district court erroneously failed to instruct the jury what Nor-West had to do to be financially capable of competing with Continental, (2) Special Verdicts Nos. 11-15 were erroneous and prejudicial, (3) the district court erred by asking the jury about the validity of the City's reasons for denial of a second franchise without asking about the validity of the City's motives, (4) Nor-West's financial strength is irrelevant to the merits of its claim, (5) the district court erroneously submitted the substantive issue of first amendment protection to the jury, and (6) the issue of general damages should have been submitted to the jury.

Nor-West's first argument is that:

> [s]tanding, for purposes of damages, required Nor-West to convince the jury that it had the ability and intent to build a competitive cable system. That turned, in large part, on the system it could be required to build. The court, however, refused to make any rulings as to which, if any, of City's demands could be imposed on Nor-West, which was highly prejudicial.

Brief for Appellant at 42. The district court rejected this argument, because "there were irreconcilable differences of opinion between counsel for [Nor-West and the City] as to what are permissible requirements." *Nor-West II*, slip op. at 5. Furthermore, the district court's standing

instructions were "structured so that the jury first had to determine what kind of system [Nor-West] sought to build (not what was legally permissible to build), whether it had the financial [ability to operate a cable system] . . . and whether it had the necessary intent." *Id.* at 6.

As the district court noted, Special Verdicts Nos. 1-3 and Nos. 5-7 asked the jury what system "Nor-West *requested permission* to build . . . in competition with Continental," *Nor-West I*, slip op. at 1-2 (emphasis added). Thus, the question of what system the City would have required Nor-West to build is beside the point, and Nor-West lacks standing even if the district court should have instructed the jury to determine what system the City should have required Nor-West to build.

The other arguments raised by Nor-West all relate to issues other than standing. For instance, the validity of Special Verdicts Nos. 11-15 (which address the possible disruption resulting from the installation of a second cable system) is irrelevant to the issue of standing, because the district court's standing decision was based on the jury's answers to Special Verdicts Nos. 1-3 and 5-7. Similarly, the validity of the City's substantive defenses or of any instructions related to the merits of Nor-West's claim, as well as Nor-West's eligibility for recovery of general damages, relate to the merits of Nor-West's first amendment claim and not to the issue of standing.

Accordingly, we hold that the district court did not abuse its discretion in giving the special verdicts and instructions to the jury.

E. Evidentiary Issues

Nor-West also challenges two of the district court's evidentiary rulings: the exclusion of one of Nor-West's expert witnesses and the exclusion of an indemnity agreement between the City and Continental. Each of these issues will be addressed in turn.

1. Excluded Expert Testimony

At trial, Nor-West sought to introduce the testimony of William Lee, Nor-West's journalism expert. The district court excluded such testimony, because Dr. Lee's testimony was "without foundation and irrelevant to the issues submitted to the jury." *Nor-West II*, slip op. at 14. On appeal, Nor-West challenges the district court's exclusion of Lee's testimony, on the grounds that Lee would testify as to "the effect of [the] City's control of the cable television market on cable operators as journalists, including the danger of content discrimination," Brief for Appellant at 42, and "the need for franchise provisions and the genuineness of [the] City's alleged defenses and interests . . . such as universal service and [the need for] access channels," Reply Brief for Appellant at 19-20. We fail to see how such testimony relates to standing, and accordingly find it unnecessary to decide whether Lee's testimony was properly excluded.

2. The Indemnity Agreements

Nor-West also unsuccessfully sought to introduce evidence of two indemnity agreements between Continental and the City. These agreements provided that

Continental would indemnify the City from liability arising out of the City's franchising procedure and its failure to award more than one cable franchise. The district court excluded such evidence under Federal Rules of Evidence 403 and 411. On appeal, Nor-West attacks the district court's ruling on the merits, and argues that the indemnity agreements are relevant to standing, for two reasons.

First, Nor-West argues that because the agreements were negotiated before December 5, 1983 (the date on which Nor-West first requested a second franchise), their existence is probative as to whether Nor-West in fact intended to seek a second franchise and the credibility of City officials' testimony that "they had no idea, until the receipt of the December 5 letter, that Nor-West was claiming to seek a second franchise." Reply Brief for Appellant at 18. However, at least one other company besides Nor-West and Continental competed for an exclusive franchise. Thus, defendants' execution of the indemnity agreements does not prove that defendants believed that Nor-West planned to seek a competitive franchise, let alone that Nor-West actually intended to do so.

Second, Nor-West argues that the indemnity agreements prove that the City's expert witnesses were biased, because they were "in fact, testifying for Continental and not for [the] City, as the jury was led to believe." Reply Brief for Appellant at 18. As the City was the major defendant in this action, it is obvious that the City's expert witnesses would have been equally biased no matter which defendant was paying them.

We therefore hold that the district court's evidentiary rulings were unrelated to the issue of standing, and

accordingly decline to address those rulings on the merits.

F. The Dismissal of Continental

Finally, Nor-West challenges the district court's dismissal of Continental as a defendant. If, as we believe, Nor-West lacks standing to sue the City, it also lacks standing to sue Continental.

Accordingly, we hold that Nor-West lacks standing to bring the present suit and affirm the district court's judgment in favor of defendants.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX 2

DISTRICT COURT'S ORDER FOR JUDGMENT (SEPT 1, 1988)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS, PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class,

Defendant,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC.,

Defendant in Intervention.

3-83 CIV 1228

ORDER FOR JUDGMENT

The above entitled matter came on for trial before the undersigned and a jury on April 18, 1988.[1] On June 10, 1988, the jury rendered its special verdict as follows:

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[1] No injunctive or monetary relief was sought from Continental Cablevision of St. Paul, Inc. Continental's participation in the case was limited to the indemnification provisions of its contract with the City, evidence of which the court declined to admit. At pretrial conference, Continental indicated that it

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1. Did Nor-West have the financial ability necessary to design, construct and operate the cable television system which Nor-West requested permission to build after August 2, 1983, in competition with Continental Cablevision in St. Paul?

NO

2. Was Nor-West capable of obtaining and providing the technical capability necessary to design, construct and operate the cable television system which Nor-West requested permission to build after August 2, 1983, in competition with Continental Cablevision in St. Paul?

NO

3. If Nor-West had been given the opportunity to build the cable television system it requested permission to build after August 2, 1983, in competition with Continental Cablevision, would Nor-West have built the system?

NO

4. Did the City, by use of its request for proposal process, intend to discourage expression of the viewpoint of Nor-West?

NO

5. At this time, does Nor-West have the financial ability necessary to design, construct and operate the cable television system it has requested permission to build

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would not actively participate at trial and that no one would, in fact, sit at counsel table. The plaintiff stated it had no objection to Continental's decision not to participate in the trial. The court will dismiss Continental Cablevision of St. Paul, Inc.

in competition with Continental Cablevision in St. Paul?

NO

6. At this time, is Nor-West capable of obtaining and providing the technical capability necessary to design, construct and operate the cable television system it has requested permission to build in competition with Continental Cablevision in St. Paul?

NO

7. If Nor-West were given the opportunity at this time to build the cable television system it has requested permission to build in competition with Continental Cablevision in St. Paul, would Nor-West build such a system?

NO

8. If, in 1983, Nor-West had been permitted to and had constructed the cable television system which Nor-West requested permission to build in competition with Continental Cablevision in St. Paul, what would be the difference, if any, between the cost of such a system and its current value?

$ 0

9. If, at this time, Nor-West were to be permitted to construct the cable television system which it requested permission to build in St. Paul in competition with Continental Cablevision what damages, if any, would the plaintiff suffer due to the delay of its entry into the market?

$ 0

10. What sum of money did Nor-West expend in attempting to obtain a cable franchise from the City of St. Paul in 1982-83?

$265,000

11. As they existed in 1983, would the public utility facilities and rights of way in St. Paul have been unable, by reasonable rearrangement, to accommodate more than one cable television system?

NO

12. Would the installation and maintenance of more than one cable television system in St. Paul cause a substantial disruption of or substantial burden to the public domain?

YES

13. Would the installation and maintenance of more than one cable television system in St. Paul create substantial environmental problems?

YES

14. Would the installation and maintenance of more than one cable television system in St. Paul substantially disrupt the use of private property?

NO

15. Would the installation and maintenance of more than one cable television system in St. Paul cause substantial safety hazards to the public?

NO

16. Does St. Paul have a substantial interest in ensuring the availability of cable television service to all St. Paul residents?

YES

17. Does St. Paul have a substantial interest in ensuring the availability of some cable television channels for public, educational and governmental access uses?

YES

18. Is the economic demand for cable television in St. Paul sufficient to support the existence of only one cable television company?

YES

The court adopts the facts found by the jury as set forth above to be the facts in this action.

I. JURY FINDINGS.

In cases in which both legal and equitable claims are made and in which a jury trial is demanded for the legal claims, the general rule is that the legal issues are to be tried first with the court deciding the equitable claims later. *Curtis v. Loether*, 415 U.S. 189, 197 n.11 (1974). When there are facts common to both claims, those facts are first submitted to a jury, if one is demanded. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). On the court's own motion or by agreement of the parties, a jury can be merely advisory; the court must then make its own findings of fact conclusions of law. Fed. R. Civ. P. 39(c).

The plaintiff, Nor-West, demanded a jury. Throughout the pretrial conferences and the trial itself, the court repeatedly suggested that the plaintiff reconsider and have the case tried to the court alone. Prior to and throughout trial, the plaintiff insisted on the use of the jury. It was, therefore, agreed that the special verdict form be submitted to and answered by the jury. It was the intention of both the court and the parties that the fact issues were to be determined by the jury. At no time did the court or did the parties agree that the jury be merely advisory.

The plaintiff now asserts that jury findings numbered 5, 6, and 7 are merely advisory, even though counsel for plaintiff argued at an earlier date that when legal and equitable claims are tried together, all factual determinations made by the jury are binding on the trial court.[2] Further, in order for jury findings to be advisory, the parties or the court must have agreed in advance that the findings were merely advisory. *See, e.g., Stockton v. Altman*, 432 F.2d 946, 950 (5th Cir. 1970), *cert. denied*, 401 U.S. 994 (1974). *See also, Blackhawk Hotels Co. v. Bonfoey*, 227 F.2d 232 (8th Cir. 1955).

This court recognizes that when a claim is reserved for the court to decide, the court is *entitled* to make necessary findings independent of the jury. *Jungmann v. St. Regis Paper Co.*, 682 F.2d 195, 197 (8th Cir. 1982). However, in a case such as this, the jury was asked factual questions which go to the heart of the issue of Article III standing. It would be impossible for the court to hold that the plaintiff lacks standing for the legal issue, which must be tried first, but that the plaintiff has standing for the equitable issue. Because the plaintiff insisted earlier that the jury verdict on the legal issue was binding on the trial court's determination of the equitable claims, the court is bound by the jury's findings. Further, the court chooses to be bound by the jury's findings. Finally, the court adopts such findings as the facts in this case.

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[2] *See Plaintiff's Pretrial Submission*, September 12, 1986. It is simply too late for the plaintiff to argue that some of the jury findings should now be taken as advisory.

III. [sic] STANDING

To have Article III standing a plaintiff must have a personal stake in the outcome of the controversy. Further, the plaintiff must itself be injured, and such injury must be fairly traceable to the conduct of the defendant. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977). Likewise, the injury suffered by the plaintiff must be capable of being redressed by a favorable decision of the court. *Id.* Standing concerns "whether the particular plaintiff is entitled to an adjudication of the particular claim asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Without Article III standing, a plaintiff cannot request any type of judicial relief. *Safir v. Dole*, 718 F.2d 475, 481 (D.C. 1983), *cert. denied*, 467 U.S. 1206 (1984).

The jury found that Nor-West did not have the financial ability, technical capability, or the intent necessary to design, construct, or operate a cable television system after August 2, 1983. Likewise, the jury found that at the time of trial the plaintiff, Nor-West, does not have the financial ability, technical capability or the intent necessary to design, construct and operate a cable television system. Therefore, the plaintiff lacks the necessary Article III standing to assert that its first amendment rights were violated. The plaintiff suffered no injury flowing from the defendant's conduct, because it in fact never intended to design, construct and operate a cable television system in St. Paul, nor did it have the ability to so design, construct and operate a cable television system.

It should be noted that it was not necessary for the plaintiff to prove that a cable system *would* be built, but the plaintiff must establish that it *could* have built a cable

system. The United States Supreme Court has recognized that the standing issue does not require that a plaintiff secure exact financing. The court recognizes that all construction projects are subject to some uncertainties. *Arlington Heights*, 429 U.S. at 261. However, in order to prevail, the plaintiff here must have shown that it had the financial commitments or ability to design, construct and operate the cable company it requested after August 2, 1983, and that it had such commitments or ability at the time of trial. Based upon the evidence at trial, the jury found no financial ability either after August 2, 1983, or at the time of trial.[3]

The Supreme Court in *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd.*, 476 U.S. 488, 494 (1986), stated that "the activities in which [the plaintiff] allegedly seeks to engage plainly implicate First Amendment interests." The plaintiff in its complaint, as well as the court in its instructions, recognized that to be a cable operator an entity must be ready, willing and able to operate a cable television system. This in turn was defined by plaintiff and accepted by the court as having the financial and technical capabilities plus the intent necessary to design, construct and operate a cable television system. The jury found the plaintiff not to be ready, willing and able to operate a cable television system in St. Paul and, therefore, it was not and is not a

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[3] The plaintiff submitted a letter to this court dated August 3, 1988, indicating that it has, since the conclusion of the trial, arranged some type of financing. Any such evidence should have been available and offered at trial. Its submission at this time is totally inappropriate.

cable operator entitled to First Amendment protection. Simply stated, the plaintiff lacks a legally protectable interest.

III. DAMAGES.

Alternatively, even if the plaintiff did have standing, the jury found that the plaintiff suffered no damages. The jury was asked two separate damage questions apart from the question of what sum of money the plaintiff expended in seeking the original franchise. On each of the two damage questions (questions 8 and 9) the jury was instructed to answer the questions separately. The jury was further instructed that it was up to the court to determine if the City was liable to the plaintiff and that the plaintiff would recover only one amount from either question 8 or 9, but not both. The court indicated that it would award the appropriate damage calculation in the amount found by the jury. The jury was instructed that regardless of how they answered the other questions on the special verdict form, they were required to answer questions involving the plaintiff's request for damages. The court continued that "whether or not the plaintiff will in fact recovery [sic] money damages will be decided by me after I receive the answers to your other special verdict questions."

With these instructions in mind, the jury found no damages. Thus, even if the plaintiff had standing and the court found the balance between the plaintiff's first amendment right and the justifications found by the jury

to rest in favor of the plaintiff,[4] the jury found by its answers to questions 8 and 9 that the plaintiff sustained no damage.

The jury did find that the plaintiff expended $265,000.00 in seeking the cable television franchise in 1982-1983. The court would only award this amount if, in fact, the Request for Proposal ordinance was found to be unconstitutional. As a general rule, unsuccessful bidders are not entitled to recover damages. *Carlson T.V. v. City of Marble*, 612 F. Supp. 669, 672 (D. Min. 1985). However, challenges to a procedure later to be determined unlawful can result in a recovery of damages and expenses. *Telephone Associates v. St. Louis County Board*, 364 N.W.2d 378 (Minn. 1985). Since the plaintiff lacks standing, it has no way to challenge the ordinance. Because the plaintiff lacks standing to challenge the constitutionality of the ordinance, the court cannot find the ordinance unconstitutional, and no expenses can be recovered by the plaintiff.

IV. EQUAL PROTECTION CLAIM.

The plaintiff also asserts an equal protection claim. The plaintiff agreed to have the court decide this claim at the same time as the claim for injunctive relief. For the same reason the plaintiff lacks standing to challenge the

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[4] The court specifically declines to analyze or speculate as to what its conclusion would be if it had to, in fact, balance the City's justifications as found by the jury against the first amendment right of the plaintiff.

ordinance and the first amendment status, it likewise lacks standing on the equal protection issue.

To have a valid claim under the equal protection clause the plaintiff must be a member of the class discriminated against. *Warth v. Seldin*, 422 U.S. 490 (1975). The jury found that the plaintiff did not have the financial or technical capabilities or the intent necessary to design, construct and operate a cable television system either after August 2, 1983, or at the present. Thus the plaintiff is not a member of the class of cable operators arguably discriminated against. The plaintiff cannot prevail on an equal protection violation claim.

V. INJUNCTIVE RELIEF.

As discussed earlier, the jury found the plaintiff was not ready, willing and able to be a cable operator at the time of trial. Further, the jury found even if given the opportunity to build, the plaintiff did not intend to build at the time of trial. In order for this court to grant the plaintiff injunctive relief, the court must find the ordinance unconstitutional. Because the plaintiff does not have standing, *see discussion supra*, the question is not properly before the court. Thus, any request for injunctive relief must be denied.

The plaintiff argues that the court must make its own findings of fact and conclusions of law as to this claim for equitable relief, contending that the jury findings 5, 6 and 7 are not "facts common" to the legal claim. However, jury findings 5, 6 and 7 deal with facts common to the legal claim, as they would have set parameters as to the type of damage the court would award. The court

declines to make separate findings of fact and conclusions of law and adopts the findings of the jury to be the facts in this case.

The question of whether the ordinance is content neutral need not be answered. Because the plaintiff is not a first amendment speaker, it lacks the necessary standing to challenge the disputed ordinance.

Upon the foregoing,

IT IS ORDERED That:

1. Continental Cablevision of St. Paul, Inc., be, and the same hereby is, dismissed as a party to this action.

2. The Clerk of Court enter judgment as follows:

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED That Continental Cablevision of St. Paul, Inc., is hereby dismissed as a party to this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the plaintiff, Nor-West Cable Communications Partnership, have and recover nothing of the defendant, and the action is dismissed with prejudice.

DATED: September 1st, 1988.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U.S. District Judge

APPENDIX 3

DISTRICT COURT'S ORDER DENYING MOTIONS J.N.O.V. ETC (Feb. 27, 1989)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class,

Defendant.

3-83 CIV 1228

ORDER

The above entitled matter is before the court on plaintiff's motions for judgment notwithstanding the verdict ("JNOV") and preliminary injunction or, in the alternative, a new trial.[1] This case was tried before the undersigned and a jury commencing on April 18, 1988. After a lengthy trial, an extended charge conference and

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[1] In plaintiff's motion for new trial, plaintiff requested the court to reconsider its order dated September 18, 1987, in which the undersigned affirmed Magistrate Janice M. Symchych's order relating to sanctions of the plaintiff and limiting the scope of the plaintiff's witnesses and their testimony at trial. Plaintiff's Memorandum in Support of its Motion for New Trial at 28 n. 9. The order dated September 18, 1987, is sound and does not constitute grounds for a new trial.

jury deliberations, the jury returned its special verdict on June 10, 1988.

On September 1, 1988, the court issued its order for judgment adopting the findings of fact made by the jury. The court concluded that the plaintiff lacked the standing necessary to sue or seek injunctive relief, and that even if the plaintiff had standing and if the court would have balanced the factual issues in favor of the plaintiff, the court would be unable to award damages or grant injunctive relief because the jury found that the plaintiff suffered no damages.[2]

Before addressing the merits of the plaintiff's motions, several observations are appropriate. First, the case was ably tried and hard fought. The lack of law in the area provided continuing obstacles for the court as well as the parties. Second, the vastly different views of the parties as to the legal theory of the case created a continual struggle among the parties and the court. The plaintiff, arguing that cable television and its operators are nothing more than high-tech newspapers and editors, believes that, like newspapers, the standard of review of defendant's conduct was to be strict scrutiny under the first amendment. That would require that any municipal regulation, including that of the defendant, be based on a

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[2] In the September 1, 1988, order, the court dismissed Continental Cablevision. In its motions, the plaintiff asserts that such action was unfair and highly prejudicial to the plaintiff and that it should be able to seek damages jointly against Continental. Not only did the plaintiff not seek injunctive or monetary relief from Continental, the jury verdict finding no damages renders the plaintiff's argument moot.

"compelling governmental interest." Charge Conference on June 2, 1988 (hereinafter cited as Charge Conference I) at 16; Plaintiff's Memorandum in Support of its Motion for New Trial at 25. The defendant, on the other hand, recognizing that cable television and its operators have some first amendment protection, argued that the standard of review was that "the interest of the government has to be a reasonable interest meaning that it certainly has to rise to more than the level of an incidental interest." Charge Conference I at 3. Finally, the parties disagreed as to the extent of the jury's role as the finder of fact. The plaintiff, who demanded a jury, did not want the alleged defenses of the City to be submitted, whereas the defendant thought their submission was imperative. Such fundamental differences remain apparent in the post-trial submissions of the parties.

After a lengthy and thorough review of the record in this case, as well as the extended and verbose post-trial briefs submitted by counsel, the court concludes that the plaintiff's motions must be denied.

I. PLAINTIFF'S MOTION FOR JNOV AND PRELIMINARY INJUNCTION.

1. Standard of Review.

The plaintiff moves for JNOV based upon three alternative grounds, addressed here individually. The standard for granting JNOV is well-settled. The court must decide as a matter of law whether the evidence was sufficient to create an issue of fact for the jury. *Lane v. Chowning*, 610 F.2d 1385, 1388 (8th Cir. 1980). *See generally* 9 C. Wright & A. Miller, *Federal Practice and Procedure*,

§§ 2524 and 2536 (1971). In making this determination the court must: a) consider the evidence in the light most favorable to the prevailing party; b) assume that the jury resolved all conflicts of evidence in favor of the prevailing party; c) assume as true all facts which the prevailing party's evidence tended to prove; d) give the prevailing party the benefit of all favorable inferences which may be reasonably drawn from the proven facts; and e) deny the motion if in light of the above, reasonable jurors could differ as to the conclusions that could be drawn from the evidence. *See, e.g., McGee v. South Pemiscot Scott Dist. R-V,* 712 F.2d 339, 3443 (8th Cir. 1983) citing *Hanson v. Ford Motor Co.,* 278 F.2d 586, 596 (8th Cir. 1960). In addition, one panel of the Eighth Circuit Court of Appeals has imposed a further restriction on granting JNOV by stating that as a general proposition, only evidence favorable to the non-moving party should be considered. *Dace v. ACF Indus., Inc.,* 722 F.2d 374, 377 (8th Cir. 1983).[3]

2. Discussion.

First, the plaintiff argues that the portion of the jury's special verdict that goes to standing is not binding on the court. The plaintiff cites *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485 (1984) for the proposition that in a case in which constitutional rights are involved, those findings by the jury which are favorable to the

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[3] Although *Dace* involved a directed verdict, the standard for granting a motion for directed verdict and a motion for JNOV are the same. *See Farner v. Paccar, Inc.,* 562 F.2d 518, 522 (8th Cir. 1977). *See also Rule v. Lutheran Hospitals & Homes Society of America,* 835 F.2d 1250, 1252 (8th Cir. 1987).

exercise of the plaintiff's first amendment rights are binding on the court, but those findings which are not favorable to the plaintiff are not binding.

The defendant maintains that *Bose* is not as broad as the plaintiff implies. The court agrees that by its own terms *Bose* is limited in its application to appellate court review and is not nearly as sweeping as the plaintiff suggests. *Id.* at 514. Yet, even if under *Bose* the court was not bound by the portions of the jury verdict that were unfavorable to the plaintiff's first amendment rights and it was necessary to independently review the record, the court, in its September 1, 1988, order did so by specifically choosing to adopt the findings of the jury as the facts in this action. The plaintiff's argument is without merit.

Secondly, the plaintiff contends the jury was forced to answer the special verdict dealing with standing (Questions 1-3, 5-7) in a "constitutioal vacuum" and that without instructions as to what kind of system the plaintiff was legally required to build, the jury was unable to properly analyze and answer the questions. From the outset, according to the plaintiff, it has been willing to construct a system consistent with all "legitimate police power demands." Without instructing the jury on what was legally permissible for the City to require was putting the cart before the horse, in the eyes of the plaintiff.

The court, recognizing that the defendant believes all its requirements were lawful, notes that there were irreconcilable differences of opinion between counsel for plaintiff and defendant as to what are permissible requirements. The court instructed the jury that the kind

of system which the plaintiff sought to build after August 2, 1983, and at the time of trial (whether scaled down in size, shape or magnitude), was for the jury itself to decide. Each of the standing questions and their corollary instructions were intended to be structured so that the jury first had to determine what kind of system plaintiff sought to build (not what was legally permissible to build), whether it had the financial or technical ability to design, construct and operate that cable television system, and whether it had the necessary intent.[4] The plaintiff's objections to the jury instructions are noted but are not persuasive.

Likewise, the request of the plaintiff that the jury was unable to properly answer the special verdict without knowing how the court was to perform the balancing and the court was required to instruct the jury on precisely what the result would be depending on which alleged defenses they found to exist is without merit. The court considered the plaintiff's request in this regard, but could find no way to instruct the jury in the manner now suggested. Even the plaintiff was unable to divine a way to instruct the jury on how the court would make such a determination based on the number of potential results the jury could have reached.[5] The jury, in the instructions,

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[4] For example, the court in its instructions stated: "The cable system the plaintiff would have designed, constructed and operated is in dispute between the parties. You, as a jury, must determine what system the plaintiff had requested . . . and then determine whether the plaintiff had the necessary financial ability to design, construct and operate that cable television system." Jury Instruction at 28.

[5] During the charge conference, the court invited plaintiff's counsel to submit proposed jury instructions on this point. Charge Conference I at 69. None were submitted.

was made aware of the parameters of its role and was told that the court was to balance the interests of the City against the first amendment rights of the plaintiff.[6] The jury instructions accurately state the current law, that is, in this type of case, that the finder of fact decides the pure issues of fact and the court applies such facts and balances the first amendment rights of the plaintiff against the interests of the City. The court was not and is not persuaded by the plaintiff's complaints regarding the method of submission.

Finally, the plaintiff contends that it should recover the $265,000.00 found by the jury to be its expenses in seeking the franchise. The court, in its order of September 1, determined that such recovery would be warranted only if the ordinance was found unconstitutional. The court found that the plaintiff lacked the standing to challenge the ordinance's constitutionality and, therefore, the court could not find the ordinance unconstitutional and the plaintiff could not recover the expenses.

The plaintiff alleges that by participating in the franchising process, it had standing to challenge the procedures, hence, the court should rule on their constitutionality and award the plaintiff its $265,000.00 *and* grant a preliminary injunction.

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[6] The court did instruct the jury that, "Based upon your factual determinations . . . it will be my responsibility to then determine whether or not the first amendment rights of the plaintiff have been violated as is alleged in the complaint or if the contrary is true" and "after your answers are returned to the court, it is the duty of the court to apply the appropriate law and the facts as you find them." Jury Instructions at 20.

The plaintiff is still required to have the necessary standing to challenge the procedure. In the context of this case, being an unsuccessful bidder is simply not enough. At the very least, the plaintiff must show that it was ready, willing and able to design, construct, and operate a cable system as asked in questions 1, 2 and 3. Absent such showing, the plaintiff lacks the necessary standing. Similarly, even if the court were inclined to find the plaintiff had the requisite standing, the jury found it was not ready, willing and able *at the present time* and, therefore, it is not entitled to a preliminary injunction as requested.

The plaintiff also argues that the City's franchising system is unconstitutional as a matter of law and that there are no valid defenses justifying the City's choice to franchise. Such arguments are moot and the court sees no merit in discussing them at this juncture. The plaintiff contends, on a variety of issues, that the evidence is so overwhelming that the court must enter JNOV. The plaintiff's position has been carefully considered. The court is satisfied as to each and everyone of these objections, including the objection concerning the alleged lack of evidence dealing with the finding of no financial ability, that in light of the standard of review for JNOV, reasonable jurors could differ as to the conclusions that could be drawn from the evidence and the plaintiff's motion for JNOV must be denied[7] and plaintiff's motion for a

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[7] The plaintiff proposes to provide, if the court feels necessary, more evidence to help the court resolve the issue of constitutionality of the City's franchising process. In the meanwhile, it requests a preliminary injunction so it can commence

(Continued on following page)

preliminary injunction likewise, as a corollary, must be denied.

II. PLAINTIFF'S MOTION FOR NEW TRIAL.

1. Standard of Review.

The plaintiff contends, in general, that its motion should be granted because first, the court failed to give the proper instructions and the instructions that were given were insufficient. Secondly, the plaintiff contends several evidentiary issues decided in the defendant's favor were in error and were so prejudicial as to warrant a new trial.

The court's power to grant a new trial is broad. A new trial should be granted if "substantial justice has not been done." C. Wright & A. Miller, *Federal Practice and Procedure*, § 2803 at 32 (1973). Substantial justice has not been accomplished when the jury verdict is contrary to the "clear weight, overwhelming weight or great weight of the evidence," *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985) or when the court's improper evidentiary ruling was prejudicial to the moving party. *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359-60 (8th Cir. 1973).

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construction "despite the City's grant of an unconstitutional monopoly to Continental." Plaintiff's Post-Trial Brief JNOV at 34-35. The court cannot reach the question of constitutionality because the plaintiff lacks the necessary standing to so challenge. Plaintiff's request is denied.

In support of their broad assertions that the instructions were faulty and insufficient, and that substantial justice has not been done, the plaintiff offers a "laundry list" of objections.[8] The plaintiff takes a similar approach to its objections concerning the evidentiary issues.[9] After careful review of each of the objections raised by plaintiff, the court is satisfied that none of the issues raised warrant a new trial, nor were the allegedly improper evidentiary rulings, even if arguably erroneous, prejudicial to the plaintiff, Norwest, so as to require a new trial.

2. Discussion.

The court is satisfied that none of the allegations amounted to an error and even if such allegations rose to the level of error, it was harmless and could not have prejudiced the plaintiff's case and substantial justice has

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[8] Plaintiff's objections are summarized as follows: 1) The defendant admitted in its answer that the plaintiff has financial capacity and such admission is binding in the defendant; 2) constitutional standing does not depend on the plaintiff having assured financing; 3) the order of September 1 ignores overwhelming evidence to the contrary; 4) the court misunderstands the standing requirements; 5) submission of irrelevant defenses to the jury by the court was an extremely prejudicial and reversible error under Rule 49(a); 6) failure of court to submit applicable principles of law to the jury; and 7) wording of special verdicts was ambiguous and vague.

[9] Likewise, the plaintiff's objections can be summarized as follows: 1) its refusal to receive plaintiff's post-trial loan commitment is unfair; 2) exclusion of indemnity agreement was incorrect under Rule 403 to show bias; 3) dismissal of Continental was unfair and highly prejudicial to the plaintiff; and 4) failure to submit Dr. Lee's testimony to the jury was in error.

been done. As discussed previously, the evidence produced at trial was not of such a nature that the verdict was against the clear weight of the evidence. As the court indicated earlier, having adopted the finding by the jury as the facts in this case, the plaintiff clearly fails to have the necessary and requisite standing. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1978). Many of the allegations of the plaintiff need not be addressed as they go to the substance of the plaintiff's case. *Midwest Communications v. Minnesota Twins*, 779 F.2d 444, 453 (8th Cir. 1985). Having found the plaintiff lacks standing, any argument relating to special verdict questions 8 through 18 is immaterial.

The court does, even though it is unnecessary, wish to briefly discuss several of the allegations made by the plaintiff as they may, tangentially, affect the plaintiff's motion. The plaintiff argues that irrelevant defenses were put before the jury and as such, the effect on the jury was so overwhelming that a new trial is in order. Specifically, the plaintiff alleges that none of the defense-related verdict questions should have been given. The court continually stressed throughout the trial and charge conference its desire to have before it full and complete factual determinations. The special verdict questions dealing with space on poles, environmental impact, and economic scarcity all stem directly from *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), and cases cited therein.[10] Special Verdict Questions 11, 13, and 18

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[10] "We are unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which

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respectively. Questions dealing with disruption of public domain, disruption of private property, safety hazards and interest of the City in universal service and access channels (Special Verdict Questions 12, 14, 15, 16 and 17 respectively), all flow directly from the Supreme Court's discussion of the needed factual determinations in *Preferred*.[11] The Supreme Court was clear that without full and complete factual determination, further consideration was impossible. Looking to *Preferred* for guidance, this court was completely justified in submitting each and

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> the parties have an opportunity to prove those disputed factual assertions upon which they rely." *Id.* at 494.

Likewise, the Supreme Court cited *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805-807 (1984). The direct cite leads one to a discussion on a municipality's weighty, essentially aesthetic interest in the prohibition of visual clutter. In examining *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), also cited by the Supreme Court in *Preferred*, leads one to a discussion of the quality of the governmental interest which must exist when " 'speech' and 'non-speech' elements are combined in the same course of conduct." *Id.* at 376. The Supreme Court obviously felt factual determinations of aesthetic and disruption were necessary, otherwise such pinpoint cites would be unnecessary. Finally, the court specifically mentions the need for a factual determination as to existence of a natural monopoly. *Id.*

[11] The Supreme Court recognized that the factual determinations not made at the trial level dealing with space on poles ("excess physical capacity"), economic demands, practical disruptive effect of controlling and maintaining a cable system or public rights of way, aesthetics, traffic delays and hazards must be addressed by the finder of fact before the legal questions can be answered.

every special verdict question as to the alleged defenses of the City to the jury.

The plaintiff objects to the jury instructions as being vague. Absent objection at trial, such objection is waived. *See, e.g., Skogen v. Dow Chemical Co.*, 375 F.2d 692, 703 (8th Cir. 1967); *Bell v. Mickelsen*, 710 F.2d 611, 616 (10th Cir. 1983). The plaintiff has so waived objections based on vagueness. Further, the plaintiff objects to the inclusion of the word "substantial" and of the failure of the court to define the word "substantial" used throughout the special verdict form. Plaintiff's counsel, during the charge conference, stressed the need to include some type of a standard in each of the defense related questions. Mr. Farrow suggested using either the word "substantial" or "compelling," although his preference was to use "compelling." Charge Conference I at 11, 16. At no time did plaintiff's counsel object to the failure to define, or even suggest that the court define the word "substantial." Failure to object to such an inclusion at trial acts as a waiver at a later time. The plaintiff has so waived its objection to the use of and the lack of definition of the word "substantial."

The plaintiff complains that the indemnity agreement which was excluded under Rule 411 and 403 as unduly prejudicial is, in fact, relevant, admissible, and necessary for a fair jury determination of the factual issues. Further, the plaintiff alleges the agreement was relevant to show bias of a variety of witnesses. During the trial the court ruled that the indemnity agreement fell squarely within Rule 411's prohibition and also was excludable under Rule 403 as its probative value was far outweighed by its prejudicial effect. Further, the court gave counsel for

plaintiff ample opportunity to show bias of each witness. The use of the indemnity agreement for this purpose was unnecessary. Evidence of any kind of indemnity was irrelevant to all of the factual issues submitted to the jury. The evidentiary ruling was not improper.

The plaintiff complains as well that Dr. Lee's testimony was crucial to the factual determination asked in Question No. 4, as to whether the City intended to discourage Nor-West's viewpoint. A portion of Dr. Lee's testimony was taken outside the hearing of the jury. The undersigned ruled that such information was properly restricted from the jury. The jury was entirely capable of drawing its own inferences and conclusions from the existing evidence. *See, e.g., Strong v. E. I. DuPont de Nemours Co., Inc.*, 667 F.2d 682, 686 (8th Cir. 1981). The court allowed the necessary evidence to decide that question. Any error which occurred is harmless. The remainder of Dr. Lee's testimony was, in the court's view, without foundation and irrelevant to the issues submitted to the jury.

The court has painstakingly examined each of the plaintiff's points of contention in its motion for a new trial. In sum, the court is satisfied that the parties received a fair trial and substantial justice has been done.

Based on the record as presently constituted, the written submissions of counsel, and the foregoing discussion,

IT IS ORDERED That:

1. Plaintiff's motion for judgment notwithstanding the verdict and preliminary injunction be, and the same hereby is, DENIED;

2. Plaintiff's motion for a new trial be, and the same hereby is, DENIED.

DATED: February 27, 1989.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U. S. District Judge

APPENDIX 4

ORDER OF DEC. 26, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class, and KALBA-BOWEN ASSOCIATES, INC., a corporation,

Defendants,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC., a corporation,

Defendant in Intervention.

3-83 CIV 1228

MEMORANDUM ORDER

Smith, Juster, Feikema, Malmon & Haskvitz, by RONALD L. HASKVITZ, Esq., Minneapolis Minnesota, and Farrow, Schildhause, Wilson & Rains, by E. NICHOLAS SELBY, Esq., Sacramento, California, appeared for plaintiff.

Robins, Zelle, Larson & Kaplan, by ERNEST I. REVEAL, Esq. and DEBORAH J. PALMER, Esq., St. Paul, Minnesota, and EDWARD P. STARR, City Attorney, St. Paul, Minnesota, appeared for defendant City of Saint Paul.

O'Connor & Hannan, by ROBERT A. BRUNIG, Esq., Minneapolis, Minnesota, and Hogan & Hartson, by JAY E.

RICKS, Esq. and LISA HOOK, Esq., Washington, D.C., appeared for Continental Cablevision of St. Paul, Inc.

This matter comes before the court upon the motions of defendant in intervention Continental Cablevision of St. Paul, Inc. (Continental) (Docket Entry No. 37) and defendant City of St. Paul (City) (Docket Entry No. 38) to dismiss specific counts of the complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiff Nor-West Cable Communications Partnership (Nor-West) by its amended complaint brings this action against defendants City and Kalba-Bowen Associates, Inc. (Kalba-Bowen). Continental is a defendant in intervention. The City has moved to dismiss the first (civil rights-due process), fourth (civil rights-first amendment), fifth (Sherman Act § 2), and sixth (Sherman Act § 1) claims for relief in Nor-West's amended complaint. Continental's motion seeks to dismiss the fourth, fifth and sixth claims for relief.

I. Antitrust Claims: Counts 5 and 6

Defendants move to dismiss counts 5 and 6 on the basis that the City's actions in awarding a cable communications franchise are exempt from antitrust scrutiny under the doctrine of state action immunity. That doctrine was first articulated by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). *Parker* held that the Sherman Act did not reach actions directed by a state legislature. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the court in a plurality opinion

held that while municipalities were not automatically afforded the "state action" exemption by their mere status as governmental entities, their actions might reflect state policy and therefore would be protected when they acted "pursuant to state policy to displace competition. . . . *Id.* at 411, 413. The state policy relied upon would have to be "clearly articulated and affirmatively expressed" to receive exemption. *Id.* at 410. A political subdivision need not, however, be able to point to a detailed legislative authorization for its anticompetitive activity; and adequate state mandate would exist "when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " *Id.* at 415 (quoting from *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976).

This plurality opinion became the majority rule in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). The Court there applied the "clear articulation and affirmative expression" criterion to respondent city's ordinance imposing a moratorium on petitioners' proposed expansion of his cable-television business. The petitioner had challenged the ordinance on antitrust grounds and the city claimed immunity under *Parker*. The Court said that the ordinance could only be exempt if it constituted "the action of the State of Colorado itself in its sovereign capacity . . . or . . . municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Id.* at 52. The immunity defense was rejected in *Boulder* when the city could point only to its "home rule" charter as legislative authority for its anticompetitive actions. The Court found that

the state, rather than clearly and affirmatively authorizing government regulation of cable service, was neutral on the issue.

Recently the Eight [sic] Circuit in *Gold Cross-Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (1983) said that an expression of state policy sufficient to establish *Parker* immunity was comprised of two elements: "The legislature must have authorized the challenged activity, and it must have done so with an intent to displace competition." *Id.* at 1011. The court applied this two-part test to Kansas City, Missouri's municipal ambulance service, under which a municipal trust contracted with a single private operator to provide all service within the city. Since Missouri had enacted a comprehensive regulatory scheme that expressly authorized a one-operator system, the court found the first test easily met. In deciding the more difficult second question whether or not Missouri intended to displace competition, the court explained that a sufficient state policy to displace competition existed if the challenged restaint [sic] was a necessary or reasonable consequence of engaging in the authorized activity. *Id.* at 1013. The court found that monopoly service was the necessary consequence of having only one operator as authorized by state law. In addition, the state had enacted its own anticompetitive scheme for regulating ambulance service, which applied in addition to municipal regulations. Thus, the court concluded, there was a clearly articulated and affirmatively expressed state policy authorizing their monopoly.

The district court in *Gold Cross* had concluded that the state action doctrine required that the challenged restraint be actively supervised by the state. *See, e.g.*,

California Liquor Dealers Ass'n. v. Midcal Aluminum, 445 U.S. 97 (1980). The appellate court disagreed, saying that where a municipality provides a traditional governmental function designed to protect public health and safety, such as ambulance service, and where municipal officials are politically accountable, state supervision is not as necessary to control abuse as it is when private persons are authorized to make anticompetitive decisions. *Gold Cross, supra*, 705 F.2d at 1014 & n.13. The court said that "[r]equiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action. . . . " *Id., quoting* Areeda, Antitrust Law, ¶ 212.2a at 47 (1982 Supp.).

Finally, the Eighth Circuit in *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419 (1983), found that the defendant agency qualified for the state action exemption. In that case, a municipal consortium was formed pursuant to state law to construct and operate a solid waste disposal site. The consortium issued revenue bonds to fund construction and in the bond contract pledged to require participating municipalities to refuse to grant any license to a competing plant. Plaintiff, a privately owned waste disposal company, sued, alleging that this exclusivity provision violated the antitrust laws.

The court conceded that no statute or authority indicated that the state legislature actually contemplated that the agency would have the exclusive right to dispose of solid waste or would act in restraint of trade. Nonetheless, the court inferred the existence of an affirmative state policy permitting the anticompetitive conduct from

three factors: first, the court relied on the high priority the legislature placed on activities of intergovernmental agencies in solid waste disposal and said the legislature must have intended such agency to have the broad authority needed to further the legislative mandate; second, the court said the legislature by affirmatively addressing the waste disposal issue and providing a wide range of options was not adopting an approach of "mere neutrality" as in *Community Communications, supra,* 455 U.S. at 55; and third, the court said that the legislature in authorizing revenue bond financing must have realized the importance of assuring a source of repayment to make the bonds marketable and must have intended that the agency have the power to impose restrictions on competition if necessary to sell the bonds. *Central Iowa Refuse Systems, Inc., supra,* 15 F.2d at 426-28.

Defendant City maintains that it has met the two-part *Gold Cross* test. The first prong of *Gold Cross* requires that the legislature must have *authorized the challenged activity.* The City contends that the Minnesota legislature established a system of state regulation of cable communication.

In its declaration of legislative findings and intent, the legislature states that "[i]t is the intent of the legislature in Sections 238.01 to 238.17 to vest authority in a board to oversee development of the cable communications industry in Minnesota in accordance with the statewide service plan; . . . " Minn. Stat. § 238.01. The Cable Communications Act requires that a cable communications system obtain a franchise from a municipality before operating within its boundaries. Minn. Stat. § 28.08. A municipality may grant a franchise only in

accordance with the rules and regulations promulgated by the Minnesota Cable Communications Board (Board). Minn. Stat. § 238.05 subd. 2(a). Those rules establish the procedures by which a franchise is granted. *See* 4 Minn. Code Agency R. § 4.140. Clearly, the first prong of *Gold Cross* has been met. The legislature has authorized the franchising of cable communications systems by municipalities.

The second prong of *Gold Cross* requires that the legislature must have authorized the challenged activity *with an intent to displace competition*. Defendant City contends that the legislature intended that competition between cable communications systems be displaced. The City points to the legislature's declaration of legislative findings and intent for support of its position. According to the City, the legislature's declaration acknowledged the interface between the cable industry and areas of state concern. The City also maintains that the legislature perceived that the public's interest in cable development might not correspond with the effects of free market competition by cable communications companies. Specifically, the legislature noted that the development of cable communications systems "should proceed in accord with state and regional service objectives; . . . [T]hese objectives should encourage area-wide service where consistent with the public interest and discourage concentration of control and ownership when not in the public interest; . . . " Minn. Stat. § 238.01. The City contends that further evidence of an intent to displace competition may be inferred from the express reservation of the right of a municipality to construct, purchase and operate a cable communications system. Minn. Stat. § 238.08 subd. 3.

Nor-West disagrees with the City and argues that the legislature did not intend to displace competition among cable communications systems. Specifically, Nor-West relies on Minn. Stat. § 238.05 subd. (2)(b), which mandates that the board shall not, contrary to applicable federal and state law, prescribe "a requirement that no such franchise may be exclusive." Nor-West also points to the declaration of legislative findings and interest, and notes the absence of any reference to the creation of unnatural monopolies or a suggestion that it would be in the public interest to exclude potential competitors. Instead, according to Nor-West, the legislative intent evidences a desire to foster the rapid growth of the cable communications industry in the state. *See* Minn. Stat. § 238.01.

While it is true, as Nor-West has suggested, that the legislature never specifically stated an intent to displace competition, such an intent can be inferred under the statute. *See Central Iowa Refuse, supra,* 715 F.2d 419. The declaration of legislative findings, and intent specifically acknowledges that cable communications systems must be developed with an eye towards balancing industries' desires against the public interest. The legislative and regulatory scheme permits municipalities to franchise in most any way they want, and thus they may exclude potential cable operators from a given market. Accordingly, based on a review of the parties' arguments and the statute and regulations, the court concludes that the legislature enacted Minn. Stat. Ch. 238 with an intent to displace competition.

Nor-West presents two other arguments against the state action doctrine. First, Nor-West contends that the

subject matter of this action concerns a first amendment activity rather than public utility service. In an attenuated argument, Nor-West suggests that *if* the statute were construed to create a monopoly in a forum of expression, it would be unconstitutional; unconstitutional statutes are void and of no effect; thus, this statute provides no basis for *Parker* immunity. Nor-West's argument is premised upon the unconstitutionality of Minn. Stat. Ch. 238, an issue that is not before the court. Further, the constitutionality of the statute is unrelated to application of the state action doctrine. Accordingly, the court finds no merit to this argument.

Second, Nor-West contends that, because it has alleged that the City acted in conspiracy with Kalba-Bowen and Continental to artificially and illegally monopolize the market, it should be allowed to prove the conspiracy. Among the conspiracy allegations, Nor-West claims that City officials acted for personal gain and acted beyond the scope of their authority. Amended Complaint ¶¶ 64, 65, 71, 72. Under this analysis, according to Nor-West, the motion to dismiss should be denied. *See, e.g., Cedar-Riverside Associates, Inc. v. United States,* 459 F. Supp. 1290, 1299 (D. Minn. 1978), *aff'd on other grounds sub nom. Cedar-Riverside Associates, Inc. v. City of Minneapolis,* 606 F.2d 254 (8th Cir. 1979).

Defendants argue that the conspiracy allegation does not preclude this court from dismissing the antitrust counts under the state action doctrine. First, defendants ask the court to take judicial notice of the findings of the Minnesota Cable Communications Board. *See In the Matter of the Application of Continental Cablevision of St. Paul, Inc. for a Regular Certificate of Confirmation of the St. Paul*

Cable Communications Franchise (Minn. Cable Communications Bd. Apr. 13, 1977), *aff'd, Cable Communications Board v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658 (Minn. 1984). In ¶ 67, the Board states that "[t]he franchise ordinance and the process leading to its adoption by the City, complied in all respects with Minn. Stat. Ch. 238 and Board rules adopted thereunder." Second, defendants argue that a mere allegation of personal gain is an insufficient basis for not applying the state action immunity doctrine. *Cf. First National Bank of Omaha v. Marquette National Bank of Minneapolis*, 482 F. Supp. 514, 521 (D. Minn. 1979) (absent allegations of illegality or unethical misconduct in instituting single lawsuit, defendants' conduct was not within the "sham exception" to the *Noerr-Pennington* doctrine).

The conspiracy issue in the context of the state action doctrine was recently analyzed in *Scott v. City of Sioux City, Iowa*, 736 F.2d 1207 (8th Cir. 1984). In *Scott*, the Eighth Circuit held that the state action doctrine shielded Sioux City from antitrust liability with respect to the city's contract with a private developer for a central city redevelopment project and the city's enactment of zoning ordinances limiting commercial development of the outlying areas of the city. The appellant landowners asserted that the city council acted outside state authorization and thus its actions were not immune from antitrust liability. The landowners alleged that the city's zoning decision was the product of an anticompetitive conspiracy between the city and a private developer rather than urban renewal policy. They further alleged that because the city council did not follow the procedures outlined in the urban renewal statute for amending the plan when it

passed the challenged ordinances, it forfeited state authorization. The Eighth Circuit rejected both contentions. *Id.* at 1214.

The alleged conspiracy in *Scott* involved discussions and dealings between the private developer and the city council relating to the zoning decision. The Eighth Circuit noted that antitrust immunity would be meaningless in this context unless it extended to the council's proper dealings with the private developer prior to the council's official zoning action. *Id.* at 1215. The court also concluded that the purposes of state action immunity would be frustrated if the mere label "conspiracy" were enough to warrant an antitrust trial, where there was no allegation that the council members were involved in bribery or other illegal acts. *Id.*

With regard to the alleged departure from state procedures, the *Scott* court noted that such a departure "would have to be extreme to warrant the threat of antitrust liability. State authorization for antitrust purposes does not require administrative decisions that are free from ordinary errors." *Id.* at 1215-16. In *Scott*, the alleged error was not of sufficient magnitude to necessitate abrogating the city's antitrust immunity. *Id.* at 1216.

The court also finds guidance from the United State [sic] Supreme Court's most recent pronouncement on the state action doctrine, *Hoover v. Ronwin*, 104 S. Ct. 1989 (1984). In *Hoover*, the court held that the grading of bar examinations by a committee appointed by, and according to, the Rules of the Arizona Supreme Court was exempt from Sherman Act liability under the state action doctrine. Justice Powell, writing for the majority,

criticized the reasoning of the dissent, which "would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the *Parker v. Brown* doctrine." 104 S. Ct. at 2001. The Court concluded that the district court properly dismissed the complaint for failure to state a claim upon which relief can be granted.

This court concludes that *Scott* and *Hoover* are analogous to the instant action and therefore dispositive of Nor-West's alleged conspiracy to violate the antitrust laws. Nor-West does not allege that any City officials were involved in bribery or other illegal acts. Kalba-Bowen, the City's private consultant, and Continental, a successful cable applicant, had legitimate reasons to discuss cable communication matters with City officials. As noted above, the Minnesota Cable Communications Board already has found that the City complied with state procedures. Accordingly, this court concludes that Nor-West's conspiracy allegations do not remove defendant's immunity from antitrust liability under the state action doctrine.

In the context of similar challenges to other state cable franchising systems, the state action doctrine has been applied to immunize municipalities from liability. *See, e.g., Catalina Cablevision Associates v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984); *Pacific West Cable Co. v. City of Sacramento*, No. S-83-1034 MLS (E.D. Cal. Apr. 25, 1984); *Preferred Communications, Inc. v. City of Los Angeles*, No. CV-83-5846-CBM (C.D. Cal. Mar. 5, 1984); *Acton CATV, Inc. v. City of Duarte*, No. CV-83-1018 RG (MCx)

(C.D. Cal. Feb. 28, 1984); *Century Federal, Inc. v. City of Palo Alto,* 579 F.Supp. 1553 (N.D. Cal. 1984). Based on these decisions and the above analysis, the court concludes that the defendants are immune from antitrust liability for the challenged conduct under the state action doctrine. Nor-West's antitrust claims will therefore be dismissed.

II. First Amendment Claim: Count 4

Defendants also seek to dismiss plaintiff's fourth claim for relief. In the fourth claim, Nor-West alleges that the franchising process, by restricting the number of cable television companies which are permitted to operate and use the public rights of way, infringes upon its first amendment right to free speech. The issue before the court is *not* whether cable communication system operators have first amendment rights to disseminate information, nor is the issue of cable television content before the court. Rather, the issue is whether Nor-West has a constitutional right to build and operate a cable communications system in the City irrespective of the franchising process. Nor-West's first amendment argument can be summed up in the same terms used by Judge Lynch to describe a similar argument in *Century Federal, Inc. v. City of Palo Alto,* 579 F. Sup. 1553 (N.D. Cal. 1984). It "essentially states that the business of CTV operating must be thrown open to virtually everyone with the inclination to enter the industry." *Id.* at 1561.

There is no doubt that cable operators are entitled to first amendment protection. *See Community Communications Corp. v. City of Boulder,* 660 F.2d 1370, 1376 (10th Cir.

1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). The difficult question comes in determining what governmental regulations of cable [several words are illegible here].

Defendants contend that cable television can be regulated like the broadcast media. *See, e.g., Community Communication, supra*, 660 F.2d at 1378; *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Nor-West argues that cable television regulation is more analogous to the first amendment freedoms given to newspapers. *See, e.g., Midwest Video, supra*, 571 F.2d at 1055-56 (dictum); *Home Box Office, supra*, 567 F.2d at 44-46.

Nor-West suggests that *Midwest Video* is the controlling law in this circuit. *Midwest Video* concerned a challenge to FCC regulations imposing mandatory access and channel capacity requirements upon certain cable systems. In dicta, the Eighth Circuit addressed the first amendment issue: "[W]e have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access." *Midwest Video, supra*, 571 F.2d at 1056. This pronouncement by the Eighth Circuit is not controlling in this case. First, the statement is dicta. The court did not have to address the constitutional issue. Second, *Midwest Video* and the instant action are factually different. *Midwest Video* concerned content regulation, whereas this action concerns regulation of the construction and operation of a cable system.

Defendants' arguments focus on two contentions. First, that there is no first amendment right to construct and operate a cable system franchise, Second, that the City's franchising process is a legitimate exercise of the state's police power to minimize the disruptive use of the public domain. Nor-West contends that defendants' arguments are based on theories of physical scarcity and economic scarcity, which raise factual issues which cannot be decided on the pleadings alone.

Various district courts have faced the same issue which is before this court in the instant action, and the courts are divided. Motions to dismiss first amendment claims were denied in *Pacific West Cable Co. v. City of Sacramento*, No. 5-83-1034 MLS (E.D. Cal. Apr. 25, 1984) and *Century Federal Inc. v. City of Palo Alto, supra*, 579 F. Supp. 1553. Other courts have found no merit in the first amendment claim. *See, e.g., Preferred Communications, Inc. v. City of Los Angeles*, No. CV-83-5846-CBM (C.D. Cal. Mar. 5, 1984); *Acton CATV Inc. v. City of Duarte*, No. CV-83-1018 RG (MCx) (C.D. Cal. Feb. 28, 1984); *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976 (D.R.I. 1983); *Hopkinsville Cable TV, Inc. v. Pennroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982).

This court finds the reasoning of these latter cases persuasive. As the Tenth Circuit stated in *Community Communications*, "[n]o individual disseminator has the constitutional right to be the particular person who obtains the privilege to use the medium." 660 F.2d at 1378. The state's power to minimize the disruptive use of the public domain permits the government to restrict access by prospective cable television operators. Again,

the Tenth Circuit commented on this aspect of cable franchising in *Community Communications*:

> [A] cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys, and other public ways. Some form of permission from the government must, by necessity, precede such disruptive use of the public domain. We do not see how it could be otherwise. A city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur.

660 F.2d at 1377-78 (footnote omitted). To this court, a city's selection of a franchisee to provide cable service to its community, based upon procedures outlined by state statute and regulations, raises no first amendment concerns.

Nor-West, a willing and unsuccessful participant in the City's cable franchise selection process, seeks relief under the guise of the first amendment. For the reasons stated above, no such relief is available. Accordingly, Nor-West's first amendment claim will be dismissed.

III. Due Process Claim: Count 1

Defendant City finally moves to dismiss Nor-West's first claim for relief. In that claim, Nor-West alleges that it was impermissibly deprived or property and liberty interests without due process of law.

Nor-West alleges it acquired a property interest in a cable francise [sic] when the City Council, on June 30,

1983, passed a resolution awarding a 15-year nonexclusive franchise to Nor-West. Amended Complaint ¶ 32. That resolution was subject to certain contingencies, including final approval by Nor-West, the City Council and the Mayor, and the issuance of a certificate of confirmation by the Minnesota Cable Communications Board. The resolution was later vetoed by the Mayor.

In order to establish a property interest in an award of a cable franchise, Nor-West must demonstrate a legitimate claim of entitlement by virtue of state law or agreement between the parties. *See Board of Regents v. Roth*, 408 U.S. 564 (1972). Certainly, the Minnesota Cable Communications Act provides no legitimate claim of entitlement to a cable franchise. As to the City Council resolution, this court concludes, because of the contingencies contained in the resolution, that Nor-West had nothing more than a unilateral expectation of a cable franchise. Nor-West did not acquire any contractual rights to a cable franchise by way of the City Council resolution. *See Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121 (Minn. 1980). Thus, this court concludes that Nor-West has failed to allege a constitutionally protected property interest in a cable franchise. Without such an interest, no property deprivation without due process could have occurred. Accordingly, this claim for relief will be dismissed.

Nor-West also alleges that it had a personal liberty interest in the award of a cable franchise based upon the first amendment. Amended Complaint ¶ 33. For the reasons discussed above regarding the first amendment claims, Nor-West does not have any legal entitlement to an award of a franchise by virtue of the first amendment.

Thus, Nor-West does not have a personal liberty interest in an award of a franchise. Without such an interest, no liberty deprivation without due process could have occurred. Accordingly, Nor-West's entire due process claim will be dismissed.

Based upon the foregoing,

IT IS ORDERED That the City's motion to dismiss the first, fourth, fifth and sixth claims for relief in Nor-West's amended complaint be and the same hereby is in all things granted and those claims are hereby dismissed.

IT IS FURTHER ORDERED That Continental's motion to dismiss the fourth, fifth and sixth claims of relief in Nor-West's amended complaint be and the same hereby is in all things granted and those claims are hereby dismissed.

DATED: December 26, 1984.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

APPENDIX 5

Order of May 10, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class, and KALBA-BOWEN ASSOCIATES, INC., a corporation,

Defendants,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC., a corporation,

Defendant in Intervention.

3-83 CIV 1228

MEMORANDUM ORDER

Smith, Juster, Feikema, Malmon & Haskvitz, by RONALD L. HASKVITZ, Esq., Minneapolis, Minnesota, and Farrow, Schildhause, Wilson & Rains, by ROBERT BRAMSON, Esq., Oakland, California, appeared for plaintiff.

Robins, Zelle, Larson & Kaplan, by ERNEST I. REVEAL, Esq., St. Paul, Minnesota, and EDWARD STARR, City Attorney, St. Paul, Minnesota, appeared for defendant City of St. Paul.

O'Connor & Hannan, by ROBERT A. BRUNIG, Esq., Minneapolis, Minnesota, appeared for defendant Continental Cablevision of St. Paul, Inc.

This matter comes before the court upon the motion of defendant City of St. Paul (City) and defendant in intervention Continental Cablevison of St. Paul, Inc. (Continental) to dismiss the second (civil rights/equal protection) and third (civil rights/conspiracy) claims of plaintiff's amended complaint for failure to state claims upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

I. Equal Protection Claim: Count 2

In its second claim for relief, Nor-West alleges that it was "similarly situated" to Continental and that both were "members of the class of persons known as cable television operators." Amended Complaint ¶ 38. Nor-West also alleges that the City's refusal to permit Nor-West to operate a cable television system on the same terms and conditions as Continental "constitutes an arbitrary and discriminatory classification which denies plaintiff equal protection under the law, and which restricts plaintiff's fundamental right to free speech." Amended Complaint ¶ 40.

Defendants contend that Nor-West's equal protection claim fails to state a cause of action. Defendants argue that the City's cable television franchising process need only satisfy the "rational basis" test to be valid under the equal protection clause. Nor-West has not alleged a classification based upon suspect criteria. Nor, according to defendants, is a fundamental right implicated because this court's order dated December 26, 1984 dismissed plaintiff's first amendment claim. Defendants therefore analogize the City's cable television franchising process to other municipal licensing systems. Thus, as long as the

franchising process is rationally related to a legitimate purpose within the government's police power, the equal protection clause is satisfied. Defendants maintain that the purpose of cable franchising is rationally related to the City's interest in minimizing the disruptive use of the public domain.

Nor-West, in contrast, argues that the rational basis test is inapplicable to its equal protection claim. Instead, Nor-West contends that the City's actions have implicated a fundamental right, namely, the first amendment, thus requiring use of the strict scrutiny test. Specifically, Nor-West alleges that the City's actions in the cable television franchising process led to arbitrary, discriminatory, and biased classifications which denied plaintiff's fundamental right to free speech in violation of the equal protection clause. In addition, Nor-West contends that this court's order dated December 26, 1984, which dismissed Nor-West's first amendment claim, did not address the issue as to whether the franchising process as applied in this case denied Nor-West's free speech rights in violation of the equal protection clause.

As noted above, this court held, in its order dated December 26, 1984, dismissing Nor-West's first amendment claim, that the City's cable television franchising process does not violate a first amendment right to free speech. As to Nor-West's contention that the cable television franchising process was unconstitutionally administered, the State Cable Communications Board has already determined that the City had properly and neutrally applied the procedures established by administrative rule, city ordinance and state law. *See In the Matter of the Application of Continental Cablevision of St. Paul, Inc. for a*

Regular Certificate of Confirmation of the St. Paul Cable Communications Franchise (Minn. Cable Communications Bd. Apr. 13, 1977), *aff'd, Cable Communications Board v. Nor-West Cable Communications Partnership,* 356 N.W.2d 658 (Minn. 1984). In sum, this court concludes as a matter of law that the City's cable television franchising process, neither on its face nor as applied, violated Nor-West's fundamental right to free speech.

This court faced a similar constitutional challenge to municipal licensing authority in *Minneapolis Auto Parts Co. v. City of Minneapolis,* 572 F. Supp. 389 (D. Minn. 1983), *aff'd after remand on other grounds,* 739 F.2d 408 (9th Cir. 1984). In that case, this court observed:

> Whenever a City Council uses its discretion to deny a license or permit in a given situation, it is possible to find another person who is granted such a license or permit under seemingly similar circumstances. To allow an action based on equal protection when plaintiffs are not members of a suspect class or when no fundamental rights are implicated, would be to provide plaintiffs with a federal remedy whenever an administrative body acts arbitrarily or capriciously. The Court of Appeals for the Eighth Circuit has held that such a remedy is not cognizable under § 1983 when plaintiffs allege violations of substantive due process. *See Buhr v. Buffalo Public School District No. 38,* 509 F.2d at 1201. This court sees no reason to treat plaintiffs' claim under the Equal Protection Clause any differently than it has plaintiffs' claim under the Due Process Clause since in this case the issue to be litigated would be the same in either instance – the reasonableness of the City Council's action.

Id. at 396. This same rational applies here.

To the extent that no fundamental right is implicated in this action, the court will analyze Nor-West's equal protection claim under the rational basis test. Under that test, the court concludes that the City's classifications are rationally related to a legitimate governmental purpose of minimizing the disruptive use of the public domain. Accordingly, Nor-West fails to state a claim under the equal protection clause and that claim will therefore be dismissed.[1]

II. Conspiracy Claim: Count 3

In its third claim for relief, Nor-West alleges that certain representatives of the City, along with Kalba-Bowen, "have conspired to and have denied plaintiff rights guaranteed to it under the first and fourteenth amendments to the United States Constitution." Amended Complaint ¶ 45. According to Nor-West, in its brief opposing this motion, Nor-West's civil rights/conspiracy claim is asserted under 42 U.S.C. § 1983. Accordingly, defendants' discussion in their brief supporting

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[1] In addition, Nor-West contends that the amended complaint also alleges facts for a different violation of the equal protection clause. Nor-West alleges that the City classified cable television companies differently from other businesses using public rights of way. Although these allegations do not appear specifically within Nor-West's second claim for relief, the court will address them here. As with Nor-West's other equal protection claim relating to classifications of cable television operators, the court concludes that the City's classifications, under the rational basis test, were rationally related to a legitimate government purpose. Accordingly, this equal protection claim will also be dismissed.

this motion of the need for "race-or class-based animus" under 42 U.S.C. § 1985(3) will not be addressed.

Plaintiff and defendants all agree that an allegation of conspiracy alone does not state a cause of action under § 1983. In order to state a valid civil rights/conspiracy claim under § 1983, plaintiff must also allege that the conspiracy deprived plaintiff of rights secured by the constitution and laws. *See Goldschmidt v. Patchett*, 686 F.2d 582 (7th Cir. 1982); *Safeguard Mutual Insurance Co. v. Miller*, 477 F. Supp. 299 (E.D. Pa. 1979). Nor-West contends that it has properly alleged both a conspiracy and a denial of its first amendment rights. This court, however, has concluded in this order and in its order dated December 26, 1984 that plaintiff has failed to state a claim for the violation of any substantive constitutional rights under either the first amendment or the fourteenth amendment. To the extent that plaintiff's amended complaint fails to state a claim for relief based on the violation of any substantive constitutional rights, plaintiff's civil rights/conspiracy claim also fails to state a claim upon which relief can be granted. Accordingly, Nor-West's civil rights/conspiracy claim will be dismissed.

Based upon the foregoing,

IT IS ORDERED That the motion of defendants City and Continental to dismiss the second and third claims for relief in Nor-West's amended complaint be and the same hereby is in all things granted and those claims are hereby dismissed.

DATED: May 10, 1985.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

(seal)

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class, and KALBA-BOWEN ASSOCIATES, INC., a corporation,

Defendants,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC. a corporation,

Defendant in Intervention.

3-83 CIV 1228

MEMORANDUM ORDER

This matter comes before the court upon defendant Kalba-Bowen Associates, Inc.'s (Kalba-Bowen) motion to join in the motions of defendant City of St. Paul (City)

and defendant in intervention Continental Cablevision of St. Paul, Inc. (Continental) to dismiss the first, second, third, fourth, fifth and sixth claims for relief in plaintiff's amended complaint. Defendants oppose the motion. Both sides rely on the arguments proffered in the previous motions of the City and Continental. The motion has been submitted without oral hearing based upon the previous arguments and memoranda of counsel. Fed. R. Civ. P. 78.

Based upon the reasoning in this court's orders dated December 26, 1984 and May 10, 1985, the court will grant Kalba-Bowen's motion.

Accordingly,

IT IS ORDERED That Kalba-Bowen's motion to join in the motions of the City and Continental to dismiss the first, second, third, fourth, fifth and sixth claims for relief in Nor-West's amended complaint be and the same hereby is granted, and those claims are hereby dismissed as to Kalba-Bowen.

DATED: May 10, 1985.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

(seal)

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class, and KALBA-BOWEN ASSOCIATES, INC., a corporation,

Defendants,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC. a corporation,

Defendant in Intervention.

3-83 CIV 1228

MEMORANDUM ORDER

Based upon the previous orders of this court, all claims against all defendants in this action have been dismissed.

Accordingly,

IT IS ORDERED That the Clerk enter judgment as follows:

> IT IS ORDERED, ADJUDGED AND DECREED That the plaintiff have and recover nothing of the defendants and the action is dismissed with prejudice.

DATED: May 10, 1985.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States
District Judge

CIV 31
Rev 7/82) JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT	DISTRICT Minnesota
CASE TITLE NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, v. CITY OF ST. PAUL, KALBA-BOWEN ASSOCIATES, INC. & CONTINENTAL CABLEVISION OF ST. PAUL, INC.	DOCKET NUMBER 3-83-1228 NAME OF JUDGE OR MAGISTRATE Alsop-J

[ ] **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

IT IS ORDERED, ADJUDGED AND DECREED That the plaintiff have and recover nothing of the defendants and the action is dismissed with prejudice.

CLEAR

FRANCIS E. DOSAL

(BY) DEPUTY CLERK

/s/ Judy Fisher

DATE

5-10-85

APPENDIX 6

Order of Dec. 1, 1986

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,
Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class, and KALBA-BOWEN ASSOCIATES, INC., a corporation,

Defendants,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC., a corporation,

Defendant in Intervention.

3-83 CIV 1228
ORDER
(Filed Dec. 1, 1986)

This matter comes before the court upon remand from the Eighth Circuit Court of Appeals in an order dated July 3, 1986. *Nor-West Cable Communications v. City of Saint Paul, et al.*, No. 85-5193, slip op. (8th Cir. July 3, 1986). The remand was ordered in light of the recently decided Supreme Court case of *City of Los Angeles v. Preferred Communications, Inc.*, ___ U.S. ___, 106 S.Ct. 2034 (1986). The Court of Appeals vacated the entire judgment of dismissal issued by this court.

In three separate orders dated December 26, 1984, December 26, 1984, and May 10, 1985, this court disposed of the plaintiff's civil action by denying, in part, the plaintiff's request for leave to amend its complaint and dismissing all of the counts of the amended complaint. The Eighth Circuit has instructed the court to "reassess its evaluation of all claims stated in light of *Preferred Communications*. . . . " *Nor-West Cable*, No. 85-5193, slip op. at 2. The Eighth Circuit acknowledged, however, that *Preferred Communications* involved an appeal solely on First Amendment grounds. Finally, the Eighth Circuit stated that "[i]n the event that the trial court finds that *Preferred Communications* does not affect some of the previously dismissed claims, then it is at liberty to enter its judgment based upon its initial reasoning in the judgment of dismissal from which the present appeal was filed." *Id.*

In response to the Eighth Circuit remand, this court has reviewed its previous dismissal orders, the memoranda submitted on behalf of the parties, and the relevant case law, including *Preferred Communications*. The court concludes that *Preferred Communications* does not affect the court's dismissal of the plaintiff's due process, § 1983, and Sherman Act claims. Moreover, the plaintiff has failed to cite any other authoritative case law decided subsequent to the court's orders that affects or modifies the court's prior analysis or decisions.[1] Consequently, it is

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[1] Indeed, the relevant case law decided subsequent to this court's orders have generally supported the court's prior analysis and decisions. *See, e.g., Holmberg v. Morrisette, et al.*, Nos. 85-5138, 85-5221 (8th Cir. Sept. 3, 1986) (restrictive view of "pattern" as used in the RICO statute); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) (same).

the court's view that the plaintiff' clams based upon violations of due process, §§ 1 and 2 of the Sherman Act, and 42 U.S.C. § 1983 were properly dismissed by this court and those claims are again dismissed based upon the court's reasoning in its respective orders dated December 26, 1984 and May 10, 1985. For the same reasons, the court reaffirms its earlier decision denying the plaintiff leave to amend, which prevented the plaintiff from asserting a RICO and breach of contract claim. Following this order, the remaining counts of the plaintiff's amended complaint are count two (equal protection) and count four (first amendment).

Based upon the record as presently constituted and the foregoing discussion,

IT IS ORDERED That the defendants' motion to dismiss the first (due process), third (§ 1983), fifth (§ 2 of Sherman Act), and sixth (§ 1 of Sherman Act) counts of the plaintiff's amended complaint be and the same hereby is in all things granted and those claims are hereby dismissed.

IT IS FURTHER ORDERED That the plaintiff's motion to amend its complaint to add a RICO and breach of contract claim be and the same hereby is in all things denied.

DATED: December 1, 1986.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U. S. District Judge

APPENDIX 7

UNITED STATES CONSTITUTION
ARTICLE III

ARTICLE III – THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the Untied States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different State, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be

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[1] This clause has been affected by the Eleventh Amendment.

Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

APPENDIX 8

UNITED STATES CONSTITUTION
FIRST AMENDMENT

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX 9
ORIGINAL COMPLAINT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Nor-West Cable Comunications Parnership, a General Partnership,

Plaintiff,

vs.

City of St. Paul, a City of the First Class,

Defendant.

Civil File No. 4-83-775

COMPLAINT

Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the above-named defendant pursuant to section 4 of the Clayton Act (15 U.S.C. §15) to recover damages for injury sustained by plaintiff to its business and property resulting from defendant's violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), and to redress the deprivation under color of law of rights secured by the United States Constitution, pursuant to 42 U.S.C. §1981, and §1983. Jurisdiction is conferred on this Court by 28 U.S.C. §1343, 1337 and 1331. To the extent that this Complaint involves state claims, this Court has pendent jurisdiction of those claims.

2. Venue exists in this District under 28 U.S.C. §1391(b)(c), and 15 U.S.C. §22.

3. Plaintiff seeks injunctive relief and treble damages.

FIRST CLAIM FOR RELIEF

RESTRAINT OF TRADE AND MONOPOLY

4. Plaintiff is a general partnership consisting of Harold Roitenberg, James Lupient, Wilbur C. Keefer, Roland A. Stinski, Wenda Weeks Moore, Cornell L. Moore, Jeanne Carol Sandberg, Joseph P. Lombardo, Dr. William F. Mazzitello, Patrick H. O'Neill, Joseph T. O'Neill, and O'Neill, Burke, and O'Neill Firm, with its principal place of business in St. Paul, Minnesota.

5. The City of St. Paul ("the City") was at all times herein mentioned, and is now, a city of the first class existing under and by virtue of the laws of the State of Minnesota.

6. On or about June 19, 1979 the City submitted a proposal to the Minnesota Cable Communications Board ("the Board") to approve the City's corporate boundaries as a cable service territory; the proposal was approved by the Board in October, 1979.

7. On or about June 10, 1982, the Mayor of the City publicly represented that the City Council ("the Council") would have full and final authority to grant cable communication ("CATV") franchises.

8. On August 6, 1982, the City entered into an agreement with Kalba-Bowen Associates, Inc. of Cambridge, Massachusetts ("Kalba-Bowan"), retaining Kalba-

Bowen to aid the City in evaluating applicants for CATV franchises.

9. On or about October 28, 1982, the Council adopted a Resolution that a Request for Proposals ("RFP") be sent out to seek qualified applicants to provide cable communications service in the City; the Mayor approved the Resolution on November 1, 1982.

10. The RFP was prepared by Kalba-Bowen and contains information and instructions relating to the preparation and filing of proposals, conditions and provisions regarding the installation, operation and maintenance of a cable communications system, and the procedure to be used in evaluating proposals.

11. The City instructed Kalba-Bowen to make an independent evaluation of the proposals submitted by applicants in response to the RFP.

12. An RFP was issued by the City, inviting qualified applicants to submit proposals to provide CATV to the City in accordance with requirements stated in the RFP, pursuant to a 15-year, non-exclusive franchise.

13. The RFP represented that the authority to grant CATV franchises resided with the Council, and that final selection of franchisees would be made by the Council.

14. The RFP set forth specific criteria and priorities on which applications for a CATV franchise would be evaluated.

15. On or about December 10, 1982, plaintiff filed a letter indicating its intent to apply for a CATV franchise,

and subsequently paid substantial sums for the preparation of a proposal in reliance on the representations made in the RFP.

16. Plaintiffs' application for a CATV franchise was complete in all respects and complied fully with the RFP.

17. The City received other applications for a CATV franchise, none of which complied with the requirements of the RFP.

18. On April 5, 1983, Kalba-Bowen issued its "Preliminary Assessment" of all the Proposals submitted in response to the RFP.

19. On June 15, 1983, Kalba-Bowen submitted its "Evaluation of Cable Communications Franchise Proposal".

20. On June 30, 1983, the Council concluded that plaintiffs' application for a CATV franchise met the requirements of the RFP and Minnesota Cable Communications Act ("the Act"), and directed the City Attorney to prepare a Resolution approving the issuance of a CATV franchise to plaintiff.

21. By Resolution duly adopted on July 5, 1983, the City decided to issue a CATV franchise to plaintiff, subject to certain conditions. The Resolution is attached hereto as Exhibit A and is incorporated herein by reference as though fully set forth.

22. On or about July 13, 1983, the Mayor purported to veto the Council's July 5, 1983 Resolution.

23. On July 29, 1983, the City refused to issue a CATV franchise to plaintiff, but on said date the City

decided to issue a CATV franchise to another applicant, whose Proposal did not comply with the requirements of the RFP.

24. Plaintiff has a property interest in the award of a CATV franchise by the City and plaintiff has the right to be treated fairly and without discrimination.

25. Defendant treated plaintiff unfairly by granting preferential treatment to others and by refusing to grant a franchise to the plaintiff while deciding to give a franchise to another applicant who failed to meet the requirements of the RFP.

26. The defendant's award of a franchise to another applicant who failed to meet the requirements of the RFP while refusing to grant a franchise to plaintiff who met all the requirements of the RFP was the result of a preconceived plan favoring another applicant and made a sham of the process required by the RFP.

27. The City's decision to grant a franchise to another while refusing to grant a franchise to plaintiff constituted an unlawful preference and denied equal protection to the plaintiff.

28. Said denial of equal protection, unlawful preference, and unfair treatment resulted from the acts of the City through agents, employees, representatives and elected officials, acting in concert, and conspiring with each other, by at least but not limited to the following conduct:

A. Engaging in one or more meetings and discussions with representatives of other applicants to the exclusive of the plaintiff for the

purpose of providing other applicants an unfair and unlawful opportunity;

B. Offering advice and information to other applicants for the purpose of aiding them in preparing their Proposals while failing to give such advice and information to the plaintiff;

C. Failing to make known errors and omissions in the Proposals of other applicants;

D. Failing to make known the fact that Kalba-Bowen's evaluation contained errors and omissions concerning the plaintiff's Proposal and making no attempt to correct known inaccuracies, errors and omissions in the Kalba-Bowen report with respect to the plaintiff;

E. Providing incorrect information to the Mayor and members of the Council and making the Kalba-Bowen report or reports available to other applicants for their use and information in the preparation of their Proposals before making such report or reports of Kalba-Bowen available to the plaintiff and the Council;

F. Offering information and advice to other applicants that aided them in the preparation of their Proposals while failing to give such information and advice to the plaintiff;

G. Failing to point out errors and omissions in the Proposals of other applicants;

H. Giving advice, information and assistance to other applicants by telling them things that should be put into their Proposals or should be omitted from their Proposals while failing to give the same or similar advice, assistance and information to the plaintiff.

29. The Mayor's veto of the Council's July 5, 1983 Resolution was arbitrary and capricious, unlawful, unconstitutional and void.

30. The City's refusal to issue a CATV franchise to plaintiff whose Proposal met all requirements of the RFP, is arbitrary and capricious, unconstitutional, unlawful and void.

31. By Resolution adopted on July 29, 1983, the City has decided to issue an exclusive CATV franchise to Continental Cablevision of St. Paul in violation of the City Charter, Minn. Stat. §238.05 and the Cable Communication Rules adopted thereunder.

32. Providing CATV involves the doing of business in interstate commerce.

33. Plaintiff is ready, willing and able to province CATV to the City of St. Paul.

34. Defendant has at all relevant times known that plaintiff is ready, willing and able to provide CATV to the City of St. Paul, and has also known of plaintiff's expenditures and efforts for that purpose.

35. The City, and certain of its elected officials, officers and agents, have knowingly, willfully and unlawfully combined, conspired and agreed among themselves, and others, to monopolize, to attempt to monopolize and to unreasonably restrain trade and commerce by conspiring to impair and/or destroy plaintiff's right to construct and operate a CATV in the City of St. Paul, all in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2.

36. The conspiracy involved herein consists of a continuing agreement, a tacit understanding and a concert of action between the City and its elected officials, officers, agents and employees to severely limit and

restrict competition in and free access to the installation, operation and maintenance of CATV in the City of St. Paul.

37. Said continuing agreement, tacit understanding and concerted action was undertaken for the purpose of denying consumers a reasonable choice and allocating a division of the market, all in violation of Sections 1 and 2 of the Sherman Act.

38. Said continuing agreement, tacit understanding and concert action was entered into with the specific purpose and intent to arbitrarily, unlawfully, unreasonably and knowingly, create, or attempt to create a monopoly through the elimination of fair competition by granting an exclusive franchise, whereby the franchisee selected is protected and sheltered from price competition and is allowed to monopolize or attempt to monopolize distribution of CATV in interstate commerce in the City of St. Paul.

39. Said actions of the defendant were taken for anti-competitive purposes and effect, and as such constitute a conspiracy to unreasonably restrain trade in the relevant product market of CATV services and in the relevant geographic market of the City of St. Paul. Said anti-competitive actions further constitute a group boycott or concerted refusal to deal, and thereby constitute a *per se* violation of Section 1 of the Sherman Act.

40. As a direct and proximate result of the above-described acts and practices of defendant, and its co-conspirators, competition in the relevant product market and geographic market will be lessened, and a monopoly

will be created by unfair means, all to the detriment and destruction of competition in the relevant markets.

41. The violations of the antitrust laws alleged above directly affect and restrain interstate commerce.

42. As a result of the arbitrary, capricious and unlawful activity of the defendant, and above-mentioned violations of the anti-trust laws and other illegal actions of defendant and its co-conspirators, plaintiff has and will suffer damages in the amount of at least fifteen million dollars.

43. The acts and conduct of the defendant as herein alleged have caused, and will, unless restrained, continue to cause plaintiff immediate and irreparable injury, and plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

SECOND CLAIM FOR RELIEF
SECTION 1983 CLAIMS

44. Plaintiff incorporates by reference paragraphs 1 through 43 as if fully set forth herein, and further alleges as follows:

45. The action of the defendant acting under color of authority conferred on it by law, deprived plaintiff of rights and privileges which the Constitution and laws of the United States provide equally to all persons and impairs and deprives plaintiff of its rights under the equal protection and due process clauses of the Fourteenth Amendment, in violation of 42 U.S.C. §1983.

46. Plaintiff is entitled to reasonable attorney's fees and costs in this action, pursuant to 42 U.S.C. §1988.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

THIRD CLAIM FOR RELIEF
VIOLATION IF FIRST AMENDMENT

47. Plaintiff incorporates by reference paragraphs 1 through 43 as if fully set forth herein, and further alleges as follows:

48. CATV is not a public utility. It is a non-broadcast facility which disseminates news, information, and entertainment to subscribers for a fee by (a) rebroadcasting signals originating at commercial or public broadcasting stations, (b) transmitting programming specially produced for CATV subscribers, and not available on commercial and public broadcasting stations, and (c) producing original programming in its own studios which is disseminated only to subscribers of cable television.

49. CATV consists of extensive equipment, including antennas, headend and hubs, local origination and access equipment, earth satellite receiving stations; amplifiers, coaxial cable, fibre optic cable, drops, subscriber premises equipment; said CATV systems runs over public and private property pursuant to rights obtained by contract, delivering service to each subscriber.

50. The express purpose of the aforesaid actions of the defendant was to prevent plaintiff from lawfully

engaging in the business of disseminating news, information, and entertainment, and to give plaintiff's competitors a competitive advantage over plaintiff.

51. The express purpose of the City's actions in denying plaintiff a permit to construct and operate CATV in the City of St. Paul is to preclude plaintiff from disseminating news, information, entertainment, and ideas and to expressly favor plaintiff's competitor as an alternative speaker. The City's actions have violated plaintiff's guaranty of Freedom of Speech and Press.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

FOURTH CLAIM FOR RELIEF

VIOLATION OF FIFTH AND FOURTEENTH AMENDMENTS

52. Plaintiff incorporates by reference paragraphs 1 through 43 as if fully set forth herein, and further alleges as follows:

53. Defendant refused to issue plaintiff a CATV franchise even though plaintiff met all requirements for such a franchise.

54. The failure to grant plaintiff a CATV franchise was unreasonable, arbitrary and capricious, and deprived plaintiff of rights and privileges secured to it by the Fifth and Fourteenth Amendments to the Constitution of the United States, and the laws of the United States.

55. Plaintiff is entitled to reasonable attorney's fees and costs in this action, pursuant to 42 U.S.C. §1988.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

FIFTH CLAIM FOR RELIEF
INVALIDITY OF AWARD TO CONTINENTAL

56. Plaintiff incorporates by reference paragraphs 1 through 43 as if fully set forth herein, and further alleges as follows:

57. Continental's proposal for a CATV franchise was deficient and did not comply in material and significant respects with the RFP.

58. The defects in Continental's application rendered its proposal invalid, thus making Continental's proposal ineligible for consideration by the City and making the consideration of it unlawful.

59. The procedure followed by the City in granting a CATV franchise to Continental will have the effect of granting an exclusive franchise, contrary to the City Charter, the Act, and the Regulations adopted by the Board, all of which expressly prohibit the granting of an exclusive franchise.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

SIXTH CLAIM FOR RELIEF
INVALIDITY OF MAYOR'S VETO

60. Plaintiff incorporates by reference paragraphs 1 through 43, as if fully set forth herein, and further alleges as follows:

61. The Mayor's veto of the Council's Resolution of July 5, 1983 was void and should be set aside because:

(a) The Council had the exclusive authority on the selection of CATV franchisees.

(b) The Resolution of July 5, 1983 was an administrative act in the process leading to the grant of a CATV franchise which by law can be granted only by Ordinance.

(c) The Mayor's veto was an unlawful interference with the Council's administrative process.

(d) The Mayor waived his veto power by publicly stating that the Council shall make final decision on granting CATV franchises.

(e) The Mayor announced that he waived any veto power he might have had over granting CATV franchises, for the purpose of inducing the plaintiff to submit a Proposal in response to the RFP.

(f) The plaintiff submitted its Proposal for a CATV franchise in reliance upon the Mayor's promise that he would not exercise any veto power.

(g) The Mayor breached his promise not to veto Council's action concerning CATV franchises.

(h) The City is estopped from claiming that the Mayor's veto had any effect on the Council's Resolution of July 5, 1983.

(i) The Mayor's veto of the Resolution of July 5, 1983 was arbitrary and capricious, based on incorrect information and a lack of knowledge of plaintiff's Proposal, and was based on considerations and criteria not included in the RFP.

WHEREFORE, plaintiff prays:

(a) For judgment against defendant for injuries and damages suffered by plaintiff that may be shown or ascertained, believed to be at least fifteen million dollars ($15,000,000) and that said damages be trebled as provided by Section 4 of the Clayton Act;

(b) For judgment against defendant for any other injuries and damages that may be shown or ascertained to have been suffered by plaintiff;

(c) For judgment ordering defendant to pay the plaintiff the full cost of this action, including reasonable attorney's fees;

(d) For an injunction enjoining the defendant from taking any action to grant a CATV franchise to Continental or any other person, unless and until a CATV franchise is granted to the plaintiff;

(e) For an Order holding and directing the defendant's grant or decision to grant a CATV franchise to Continental is void;

(f) For an injunction forbidding the defendant from impairing or in any way interfering with plaintiff's construction or operation of a CATV system in the City of St. Paul;

(g) For an Order directing the City to grant plaintiff a 15-year, non-exclusive franchise to construct and operate a CATV system in the City of St. Paul;

(h) For an Order determining that the Council Resolution of July 5, 1983 is valid and in force, and ordering that the Mayor's veto thereof is void;

(i) For trial by jury;

(j) For such other relief as the Court may deem fitting, just, proper and equitable.

/s/ William S. Rosen
William S. Rosen
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227-7731

/s/ Ronald L. Haskvitz
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APPENDIX 10

AMENDED COMPLAINT

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership, Plaintiff, v. CITY OF SAINT PAUL, a City of the First Class; and KALBA-BOWEN ASSOCIATES, INC., a corporation, Defendants.	Civ. File No. 3-83-1228 AMENDED COMPLAINT FOR CIVIL RIGHTS ACT VIOLATIONS, INCLUDING FIRST AMENDMENT, DUE PROCESS AND EQUAL PROTECTION VIOLATIONS; SHERMAN ACT VIOLATIONS; FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF [JURY DEMANDED]

CONTINENTAL CABLEVISION OF ST. PAUL, INC., a corporation,

Defendant in Intervention

Plaintiff, Nor-West Cable Communications Partnership, a general partnership, brings this amended complaint against defendant, City of Saint Paul, a City of the First Class, against defendant Kalba-Bowen Associates, Inc., a corporation, requests a trial by jury, and alleges as follows:

1. Plaintiff Nor-West Cable Communications Partnership (hereinafter "Nor-West") is a general partnership with its principal place of business in the City of Saint Paul, Minnesota.

2. Defendant City of Saint Paul ("the City") is a City of the First Class existing under the laws of Minnesota.

3. Plaintiff is informed and believes, and thereon alleges, that defendant Kalba-Bowen Associates, Inc. ("Kalba-Bowen") is a corporation with its principal place of business in Cambridge, Massachusetts.

4. Plaintiff is informed and believes, and thereon alleges, that defendant in intervention, Continental Cablevision of Saint Paul ("Continental"), is a Minnesota Corporation which is a wholly owned subsidiary of Continental Cablevision, Inc., a Massachusetts corporation.

5. The First, Second, Third and Fourth Claims herein arise under the Civil Rights Act (42 U.S.C. Section 1983). Jurisdiction over these claims is conferred on this Court by 28 U.S.C. Sections 1331, 1343, 2201, and 2202.

The Fifth and Sixth Claims herein arise under the Sherman Act (15 U.S.C. Sections 1 and 2) and are brought pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. Sections 15 and 26). The Court has jurisdiction over these claims pursuant to 28 U.S.C. Section 1337.

PRELIMINARY ALLEGATIONS

6. Plaintiff has, at all relevant times, desired to operate a cable television system within the boundaries of the City of Saint Paul. It has been ready, willing and able to operate such a system; it presently possesses the technical, financial and managerial abilities necessary to do so; and it has expended considerable effort and significant sums of money in preparing to enter the Saint Paul cable television market. However, it has been wrongfully prevented from operating such a system by the defendants, and each of them.

7. A cable television company, as a member of the press, competes with other mediums of communication in the general market for dissemination of news, information, and entertainment. Cable programming competes with the traditional media (e.g., AM & FM radio, movies, theatres, newspapers and magazines), as well as with other television-related means of dissemination (e.g., UHF & VHF broadcast television, multipoint distribution systems, satellite master antenna television, low power television, coded subscription television, direct broadcast satellite, and video cassettes and discs.) In addition, because the utility poles or conduits located in Saint Paul

can carry numerous cable simultaneously, direct competition between different cable companies in the same geographic area within St. Paul is both technologically and economically feasible.

8. Recognizing the above, plaintiff has never demanded an exclusive right to operate a cable television system within Saint Paul. Rather, plaintiff simply desires the opportunity to provide cable television programming to residents of Saint Paul, and it has always been – and remains – prepared to compete fairly with any other person or persons who might wish to do so.

9. In connection with its desire to provide cable television programming to Saint Paul residents, plaintiff sought to learn the method for obtaining any permits, licenses or franchises which the City deemed necessary before operating a cable television system within Saint Paul. Plaintiff cooperated fully with the City in this respect, but as is detailed below, its cooperation resulted only in the wrongful refusal of defendants to permit plaintiff to provide cable television services at all.

10. Sometime during or before 1979, the City first began to consider requests by cable television companies to provide cable television programming to persons residing within Saint Paul. However, the City did not simply assess the health and safety needs of its residents and pass uniform standards to protect those needs, as it has done for other businesses. Instead, plaintiff is informed and believes, and thereon alleges, that the City arbitrarily decided to restrict the number of cable television companies within Saint Paul to one and one only.

11. In late 1979, the City issued a Request For Proposals (RFP), designed to elicit responses from various prospective cable television operators, thus permitting the City to choose whichever *one* it liked the most.

12. In response to this RFP, at least seven different cable companies expressed the desire to operate cable television systems within Saint Paul. However, on May 4, 1981, the City decided that it would exclude *all* cable companies and operate its own system. Thus, none of the seven were at that time permitted to operate cable companies within the city limits.

13. One year later, on or about April 27, 1982, the City again reversed itself, and abandoned the concept of municipal ownership.

14. On August 6, 1982, the City retained defendant Kalba-Bowen, a self-styled "cable consultant", to aid it in its subsequent dealings with cable companies.

15. Plaintiff is informed and believes, and thereon alleges, that the City – acting on the advice of Kalba-Bowen – for a second time decided arbitrarily to limit the number of cable companies within Saint Paul to *one*. In furtherance of this end, Kalba-Bowen offered to devise a second RFP and to evaluate the proposals received in response thereto.

16. On or about November 1, 1982, the City issued an RFP document devised by Kalba-Bowen. Plaintiff is informed and believes, and thereon alleges, that Kalba-Bowen conceived and devised the RFP in such a way as

to insure that Kalba-Bowen itself would receive substantial portions of the filing fees and other sums of money required to be paid by those who submitted proposals.

17. Thereafter, when plaintiff sought to begin operation of its cable television system, it was informed by defendants that under no circumstances would it be permitted to do so unless and until it participated in the recently established RFP process.

18. Defendants represented to plaintiff, as well as to other cable companies, that the RFP process would be conducted fairly, impartially and in good faith. In addition, the Mayor of Saint Paul represented that the City Council would have full and final authority in deciding with whom the City would contract for cable television services, and that participants in the RFP process should look to the City Council and not to the Mayor for such a decision. In addition, the RFP documents mandated the Council, not the Mayor, to evaluate the proposals and select a company to whom a franchise would be awarded. In reliance upon those representations, and believing that it had no other choice if it wanted to be a cable television operator within Saint Paul, plaintiff cooperated with defendants' RFP process.

19. The RFP itself consisted of a 206-page document setting forth the various requirements, demands and conditions which the City required interested cable television companies to contractually accept as a prerequisite to being considered for selection. Any company wishing to participate in the RFP process also had to pay the City $10,000.00 as a prior condition to such participation.

20. Believing that it was required to comply with the City's RFP process in order to receive a license or franchise from the City, and in reliance upon the City's and Kalba-Bowen's representations, plaintiff expended substantial sums of money and great effort to prepare and timely submit a response to the RFP.

21. Plaintiff's proposal was in full compliance with the RFP and was accepted as such by the City. After detailed study, the City Council concluded that plaintiff's proposal was superior to the other proposals received by the City. Therefore, on or about June 30, 1983, the City Council adopted a resolution to enter into a contract with Nor-West on July 5, 1983.

22. However, soon thereafter – despite previous public representations to the contrary – the Mayor announced that he would "review" the Council's decision to award a non-exclusive cable television franchise to Nor-West.

23. On or about July 13, 1983, the Mayor purported to veto the Council's July 5, 1983 resolution awarding a non-exclusive franchise to Nor-West. The Mayor's published veto message, in which he offered reasons for his action, contained many factual errors and omissions which had been propagated by the City's communications officer and defendant Kalba-Bowen, but rejected by the Council earlier in the process.

24. Plaintiff is informed and believes, and thereon alleges, that the Mayor's decision to undertake a "review" of the Council's decision to enter into a contract with Nor-West, and his subsequent "veto" of that contract, were products of a pre-existing conspiracy between

Kalba-Bowen, the City's communications officer, and others as yet unknown, the object of which conspiracy was to bias the RFP process against Nor-West and ultimately to prevent Nor-West from obtaining the opportunity to provide cable television services to residents of Saint Paul. Plaintiff is informed and believes, and thereon alleges, that acts taken in furtherance of this conspiracy include, but are not limited to, the following:

A. Preparing assessments of the several proposals which were based upon knowingly false and misleading factual assertions highly prejudicial to Nor-West, and which concealed deficiencies in the bids of other applicants.

B. Holding one or more meetings with representatives of other companies for the purpose of "coaching" their bids, while refusing to give similar advice, information and assistance to Nor-West.

C. Failing to incorporate, respond to, or even publicly acknowledge, receipt of reports submitted by Nor-West rebutting the distortions in the preliminary assessment.

D. Changing criteria of the RFP for the purpose of biasing the evaluation against Nor-West.

E. Permitting substantial changes in the bids of other applicants after those bids had been submitted and were properly considered final.

F. Providing the Mayor with false, misleading and incomplete material about plaintiff's proposal with the intent of negating the Council's decision to enter into a contract with plaintiff.

25. The purported veto by the Mayor was an arbitrary, capricious and illegal act. Plaintiff is informed and believes, and thereon alleges, that the Mayor's purported veto either was unknowingly based upon false information provided to him as part of the conspiracy alleged above, or was an action taken by the Mayor as an active and knowing participant in said conspiracy.

26. Since the Mayor's purported veto, defendants have at all times refused to permit Nor-West to operate a cable television system within Saint Paul, and have instead entered into an agreement with defendant in intervention, Continental Cablevision, whereby Continental will provide the only such system within the Saint Paul city limits. Defendants refuse to enter into any agreement with plaintiff, even on the same terms and condition as they did with Continental. Plaintiff, moreover, is informed and believes, and thereon alleges, that the City refuses to permit Nor-West to operate within its boundaries in part to punish Nor-West for having initiated the instant action

27. The proposal submitted by Continental fell short of the minimum requirements of the RFP. The City has thus arbitrarily failed to comply with its own criteria as set forth in said RFP.

28. All of the acts alleged above have been taken under color of law.

29. If Nor-West's full compliance with each and every stated requirement of the RFP documents, and its submission of the superior proposal, did not entitle it to a

non-exclusive franchise at the conclusion of the RFP process, then that process itself must be so inherently subjective and standardless as to violate the United States Constitution and statutes.

FIRST CLAIM FOR RELIEF

(Civil Rights – Due Process)

30. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 29 above, and further alleges as follows.

31. Nor-West participated in the City's RFP process in the belief that it would be conducted fairly and in accordance with publicly stated rules and procedures.

32. When the City Council voted to enter into a contract with Nor-West, plaintiff acquired a property interest in the receipt of the contract.

33. In addition to the property right acquired by virtue of the council's July 5, 1983 resolution, Nor-West has a personal liberty interest, as a First Amendment speaker, in the fair and impartial award of a franchise according to fixed and neutral criteria established by the City.

34. Plaintiff has been deprived of these protected interests without due process of law as a result of the arbitrary and improper actions alleged above. Plaintiff is informed and believes, and thereon alleges, that this denial of due process of law was, and is, an intended and purposeful effect of the conspiracy among defendants, their agents and others as yet unknown.

35. The denial of plaintiff's right to due process of law has proximately caused plaintiff injury in amounts which are as yet unknown, but which will be set forth in full when ascertained.

36. The denial of plaintiff's right to due process of law is also causing plaintiff irreparable harm for which there is no adequate legal or administrative remedy, and which will continue unless plaintiff receives injunctive and declaratory relief as set forth below.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

SECOND CLAIM FOR RELIEF

(Civil Rights – Equal Protection)

37. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 36 above and further alleges as follows.

38. Plaintiff and Continental Cablevision are both members of the class of persons known as cable television operators. For all relevant purposes, plaintiff and Continental Cablevision are similarly situated members of that class.

39. The City has improperly discriminated between plaintiff and Continental Cablevision, in that the City has provided Continental Cablevision with a franchise to provide cable television services on certain terms and conditions, but has refused, and continues to refuse, to provide a similar franchise to plaintiff, despite requests from plaintiff that it do so. In addition, the City has specifically stated that it intends to discriminate against Nor-West

and to treat it differently than other potential cable operators in order to punish Nor-West for filing the instant action. Plaintiff is informed and believes, and thereon alleges, that said discrimination is a part of – and resulted from – the above-alleged conspiracy with Kalba-Bowen and others.

40. The City's refusal to permit Nor-West to operate a cable television system, and thereby to disseminate, on the same terms and conditions as Continental Cablevision constitutes an arbitrary and discriminatory classification which denies plaintiff equal protection under the law, and which restricts plaintiff's fundamental right to free speech.

41. By refusing to allow Nor-West to disseminate on the same terms and conditions as Continental Cablevision, the City has caused plaintiff irreparable harm for which there is no adequate legal or administrative remedy, and which will continue unless plaintiff receives injunctive and declaratory relief as set forth below.

42. As a direct and proximate result of the City's refusal to permit Nor-West to disseminate on the same terms and conditions a Continental Cablevision, plaintiff has been damaged in substantial amounts as yet undetermined, but which will be set forth in full when ascertained.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

THIRD CLAIM FOR RELIEF

(Civil Rights – Conspiracy)

43. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 42 above, and further alleges as follows.

44. As alleged above, certain representatives of the City, including the city communications officer, acting in conspiracy with Kalba-Bowen and others, devised a scheme and plan, the object and result of which has been to deny Nor-West the opportunity to operate a cable television system within Saint Paul.

45. By denying Nor-West the opportunity to operate a cable television system as a result of pre-conceived biases and arbitrary and illegal actions, defendants have conspired to and have denied plaintiff rights guaranteed to it under the First and Fourteenth Amendments to the United States Constitution.

46. These violations of plaintiff's rights have caused plaintiff irreparable harm for which there is no adequate legal or administrative remedy, and which will continue unless plaintiff receives injunctive and declaratory relief as set forth below.

47. As a direct and proximate result of the violations alleged above, plaintiff has been damaged in amounts as yet undetermined, but which will be set forth in full when ascertained.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

FOURTH CLAIM FOR RELIEF
(Civil Rights – First Amendment)

48. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 47 above and further alleges as follows.

49. The business of plaintiff cable television company, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available dissemination space (electronic capacity) to reprint (or retransmit) the programming of others, while at the same time providing original content of their own over a portion of the remaining capacity.

50. A cable television company is not a public utility, but rather is a recognized member of the media and a First Amendment speaker. A cable television company does not impose as heavy a burden on public facilities, including the public rights-of-way, as that imposed by other First Amendment speakers, such as newspapers, magazines, theatres, and the like. This is because a cable television company transmits its electronic signals through coaxial cables placed on or in pre-existing public utility facilities. Use of the public utility facilities by one or more cable television companies does not appreciably increase the burden on public rights-of-way caused by those public utility facilities.

51. Defendants' decision, as alleged above, to restrict to *one* the number of cable companies which would be allowed to disseminate in Saint Paul was and is a prior restraint on the exercise of the First Amendment

rights of Nor-West. Defendants have used the RFP process to limit the exercise of speech via cable television to one "governmentally-sanctioned" speaker

52. There exists no compelling governmental interest for imposing this artificial limit on the number of cable companies disseminating in Saint Paul. Defendants imposed this restraint without regard to any alternative means of obtaining cable services which would have been less restrictive of the rights of cable operators as First Amendment speakers.

53. Defendants have further illegally conditioned the right to disseminate via cable through its criteria for evaluating the proposals received in response to the RFP. These criteria, which are also unrelated to any compelling governmental interest, include but are not limited to the following:

A. The company's willingness to allow municipal approval of the content and quality of the programming to be carried by that company;

B. The company's willingness to surrender cash, goods, and services in kind, to the City or to City-designated organizations;

C. The company's willingness to submit to municipal control of its day-to-day business operations; and

D. The company's willingness to waive various rights, including the right to sue the City for violations of law resulting from the RFP process.

54. Plaintiff is informed and believes, and thereon alleges, that the City does not impose such an artificial

and restrictive limitation upon the number of businesses allowed to operate within the City limits on any other non-utility type of business, even those not engaged in First Amendment activity.

55. Plaintiff is informed and believes, and thereon alleges, that some or all of the acts alleged above were committed in furtherance of a past and continuing conspiracy by defendants, acting in concert with other co-conspirators, and with the specific intent of depriving plaintiff of its First and Fourteenth Amendment rights.

56. Each act taken by the defendants has been taken under color of governmental authority and right, and pursuant to an official policy or custom of such authority.

57. The conspiracy and actions of defendants, as alleged above, presently deprive and imminently threaten further to deprive plaintiff of rights guaranteed by the First and Fourteenth Amendments.

58. Plaintiff has no adequate legal, administrative or other remedy by which to prevent or minimize the continuing irreparable harm to its constitutional rights. Unless defendants are enjoined from committing the above-described violations of plaintiff's rights guaranteed by the First and Fourteenth Amendments to the Constitution, plaintiff will continue to suffer great and irreparable harm.

59. As a direct and proximate result of defendants' actions as described above, plaintiff has been damaged in substantial amounts as yet undetermined but which will be set forth when ascertained.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

FIFTH CLAIM FOR RELIEF

(Sherman Act, Section 2)

60. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 59 above, and further alleges as follows.

61. This claim arises under Section 2 of the Sherman Act (15 U.S.C. Section 2) and is brought pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. Sections 15 and 26). The Court has jurisdiction over this claim pursuant to 28 U.S.C. Section 1337.

62. The provision of cable television service involves the conduct of business in interstate commerce.

63. The relevant product market here involved is the provision of news, information and entertainment to the subscriber's television set by means of cable. This product market is part of the larger trade and commerce of ideas represented by the multiple forms of media. The relevant geographic market here involved is the geographic area within the corporate limits of the City of Saint Paul, Minnesota.

64. Plaintiff is informed and believes, and thereon alleges, that some or all of the acts of defendants, as herein before alleged, were beyond the scope of authority granted to the City of Saint Paul by the laws of the State of Minnesota, and were taken in concert with private parties as part of an illegal scheme and plan to exclude

Nor-West from the relevant market and to provide Continental Cablevision with a guaranteed monopoly in the market.

65. Defendant City, in conspiracy with Kalba-Bowen and others, has used, and continues to use, a claimed right to exclude cable television companies from public rights-of-way, and thus, from the market, and has denied plaintiff other legal rights, so as to consciously acquire, maintain, and exert monopoly power over the cable television industry in the City for the purpose of excluding competition, allocating market territories, controlling services and fixing prices.

66. Beginning at some time unknown to plaintiff, defendants have, with specific intent and with a dangerous probability of success, engaged in the acts hereinabove described which amount to monopolization of, attempts to monopolize, and conspiracy to monopolize the cable television market within the City limits of Saint Paul. Defendants now possess monopoly power, and have consciously maintained and extended it. Defendants have used this control over the marketplace to gain improper economic benefits for themselves and for others.

67. The above-mentioned violations of the antitrust laws have directly and proximately caused damage to plaintiff in its business and property in substantial amounts which are as yet unknown, and which will be set forth in full when ascertained.

68. The above-mentioned violations of the antitrust laws have also caused, and will continue to cause, irreparable injury to plaintiff. Unless defendants are enjoined

from engaging in said anticompetitive actions, plaintiff will continue to suffer great and irreparable harm.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

SIXTH CLAIM FOR RELIEF

(Sherman Act, Section 1)

69. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 68 above, and further alleges as follows.

70. This claim for relief arises under Section 1 of the Sherman Act (15 U.S.C. Section 1) and is brought pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. Sections 15 and 26). The Court has jurisdiction over this claim pursuant to 28 U.S.C. Section 1337.

71. Defendants have acted in combination and conspiracy with each other, and with others, including their own officers, officials and agents, to accomplish the wrongful and illegal acts described in this Complaint. Plaintiff is informed and believes, and thereon alleges, that some or all of the actions taken by officials of defendant City were taken for the purposes of personal gain by such officials and in attempts to further their own independent self-interests.

72. Beginning at some time unknown to plaintiff and continuing thereafter, defendants and their co-conspirators have engaged in and attempted to engage in an unlawful contract, combination and conspiracy in unreasonable restraint of interstate trade and commerce, designed to destroy plaintiff's right and opportunity to

operate a cable television system within the City in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1). The contract, combination and conspiracy herein alleged includes a continuing agreement, understanding and concert of action among defendants and co-conspirators, the substantial terms of which have been to attempt to prevent, hinder, and restrain plaintiff's entry into the relevant geographic market through a pattern of threatened and actual anticompetitive acts and statements specifically designed to accomplish the anticompetitive goal.

73. The above-mentioned unreasonable restraints of trade involve efforts to allocate customers and territories among horizontal competitors, and to fix prices. The actions of defendants and their co-conspirators also amount to a concerted refusal to deal. All such acts constitute *per se* violations of the antitrust laws.

74. Plaintiff is informed and believes, and thereon alleges, that unless restrained by this Court, defendants and their co-conspirators will continue to take actions which will unreasonably restrain interstate commerce.

75. The above-mentioned violations of the antitrust laws have directly and proximately caused damage to plaintiff in its business and property in substantial amounts which are as yet unknown, and which will be set forth in full when ascertained.

76. The above-mentioned violations of the antitrust laws have also caused, and will continue to cause, irreparable injury to plaintiff. Unless defendants are enjoined from engaging in said anticompetitive actions, plaintiff will continue to suffer great and irreparable harm.

WHEREFORE, plaintiff prays for relief as follows:

A. For damages as alleged above and in such further amounts as are proved;

B. For the trebling of such damages as appropriate;

C. For a declaration of such of plaintiff's rights as is appropriate in the circumstances;

D. For an order enjoining defendants from unreasonably interfering with plaintiff's right and opportunity to provide cable television services within the City of Saint Paul;

E. For cots of suit, including reasonable attorneys' fees; and

F. For such other and further relief as the Court deems just and proper.

Dated: 3-26-84

/s/ Omer L. Rains RHD
Omer L. Rains
Richard D. Harmon

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DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial as provided for in Rule 38, Federal Rules of Civil Procedure.

Dated: 3-26-84

/s/ Omer L. Rains RHD
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APPENDIX 11
EXCERPTS FROM REPORTER'S TRANSCRIPT
[p. 47] R. STINSKI DIRECT

A. Judy Blanchard.

Q. Is she with the bank?

A. Judy B. Blanchard, she was the commercial banking officer of the First National Bank of St. Paul.

Q. What does this letter do, what is it function – perhaps if it is short you can read it.

A. I will read it, it says this is to certify that I currently have in my possession personal financial statements from all partners of Nor-West Cable Communications partnership, specifically from – and it goes on to list the partners.

THE COURT: Let's not read them, we have had that three times. Read the last paragraph.

THE WITNESS: While I cannot reveal the detail of the statements I can report the total net worth of these individuals is in excess of $76 million, a good portion which is in liquid assets including $10 million in cash.

BY MR. FARROW:

Q. Thank you. Now Mr. Stinski, I'm going to give you a series of exhibits all at once here, the numbers start at 347 and go consecutively – a terrible word – to 358.

THE COURT: They have all been received?

MR. FARROW: As far as I can tell.

BY MR. FARROW:

Q. While they are all addressed, each letter is addressed to

* * *

[p. 63] the lawyers are there and I –

THE COURT: I agree, I think the Jury is entitled, to know, get us through this process as to how we got to where we are today.

(Proceedings had in open Court in the presence of the Jury.)

BY MR. FARROW:

Q. Now at these meetings before the City Council were there documents prepared by your side of the process?

A. Yes, there was.

Q. And other people?

A. Yes, other people also.

Q. And was there a process by which you got copies of theirs and they got copies of yours?

A. In some cases that happened, yes.

Q. Now this went on for – all the way into June, is that right?

A. This went all the way into the awarding of the franchise and I think that was June 30.

Q. June 30 –

A. Of 1983.

Q. – 1983. What happened on that day?

A. There was a vote by the City Council and the vote was the award of the – they awarded the franchise to Nor-West Communications Cable partnership.

[p. 64] Q. That was a vote of how much?

A. A vote of four to three.

Q. Now as of that time, as of that time I understood that you had spent a little over or some certain sums of money with Mr. Bertman. Did you spend the sums of money?

A. Yes, we did.

Q. Do you have a notation as to how much you spent on the process as of that time?

A. The total amount spent?

Q. Yes.

A. $649,223.97 up to July 13, 1983.

THE COURT: I am sorry, July 18?

THE WITNESS: July 13, 1983. I believe that is the date of the Mayor's veto, that is why this –

BY MR. FARROW:

Q. That was going to be the next question. What happened next?

A. I am sorry?

Q. What happened next?

A. Well, I think that we met before the Mayor's veto and we had to get confirmation of our franchise which was either the 5th or 6th of July, and I think the Mayor had five days or some time in which to either veto it or accept it and he vetoed it within that period of time.

Q. All right.

* * *

[p. 254] H. CUSHING DIRECT

During the course of the trial and during the course of Mr. Stinski's testimony also there were references to proceedings that were had before the Minnesota Cable Communications Board and also the Minnesota Supreme Court.

During the trial there no doubt will be further references to those proceedings. I instruct you that neither the Cable Board, Minnesota Cable Communications Board, nor the Supreme Court, had before them, nor did those bodies resolve, the constitutional issues that are before us in this case. Therefore the rulings that were made by either of these bodies do not control our deliberations and I point that out to you just in case you are wondering the effect of the testimony with reference to those other proceedings and, we will perhaps hear more about that before the trial is completed.

All right, Mr. Farrow?

MR. FARROW: We call Mr. Harry Cushing.

HARRY P. CUSHING,

called as a witness, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FARROW:

Q. Mr. Cushing, could you give us your address please?

A. My home address is 730 Northwest 79th Avenue, Unit C-3, Tamarak, Florida; 33321.

Q. And your occupation, Mr. Cushing?

* * *

[p. 702] H. ROITENBERG DIRECT

a challenged matter, in approximately July of 1984.

A. Correct.

Q. Do you recall what led you to do that, that is to withdraw from the partnership at that time?

A. Well, I think it was two or three months earlier that I had just had enough of the cable TV, they had the ups and downs and heart breaks and I just had enough of it. I didn't want any part of its anymore.

Q. Did the situation with regard to the process in St. Paul that had developed starting in early 1983 play any part in this decision?

A. Well, certainly it had – it had – it was part of the reasons.

Q. Now at the time would you have remained a partner in Nor-West if Nor-West had been allowed to compete with Continental?

MR. REVEAL: Objection, speculation.

THE COURT: Objection sustained.

BY MR. HASKVITZ:

Q. Let me see if I can develop that in this regard.

Do you recall an attempt in the latter part of 1983, perhaps August-September-October, where you were involved in some contact with the utility companies?

A. I, myself, was not in contact with them but some representatives of our company had gone to Northwestern Bell

[p. 703] H. ROITENBERG CROSS

and to Northern States Power, I am not sure if they were both involved, to try to get permission to put our lines on their poles which would indicate, yeah, we were seriously considering it.

Q. At that time the utility companies had agreed you were prepared to compete –

A. Yes.

Q. – with Continental?

A. Yes.

Q. And that subsequently you were still a partner as you said in the summer of 1983 when Mr. Farrow wrote to the city?

A. Yes.

Q. So I gather you were prepared at least at that time also

A. Yes.

Q. – to compete with Continental?

A. Right.

MR. HASKVITZ: I think that is all I have.

THE COURT: All right, cross examination of Mr. Roitenberg?

CROSS EXAMINATION

BY MR. REVEAL:

Q. Good morning, Mr. Roitenberg. Let me begin by covering just some general background questions with you if I might. You originally were simply a general partner in Nor-West, correct?

* * *

[p. 854] WHEREUPON, the following proceedings were had:

(The following proceedings had in open Court outside the presence of the Jury.)

THE COURT: Good morning. Do I understand the plan is to interrupt Mr. White and go with Mr. Lee?

MR. FARROW: Yes, Your Honor.

THE COURT: All right. Now I have a couple of little preliminaries for you. As I see it, over the weekend I took care of two grandchildren and also read an outline of testimony by William E. Lee. I read the briefs that were submitted for and against the motion in limine with reference to the testimony of William E. Lee and I perused and, indeed more than perused, I won't tell you I

read, but I surely went through and became acquainted with, familiar with the deposition testimony of William Lee consisting of 172 pages, albeit I didn't read line for line, but I did go through it.

My understanding is that one of the defenses of the City of St. Paul is that cable television is a natural monopoly in the City of St. Paul, is that true, is that the claim?

MS. McKINSEY: That is correct, Your Honor.

THE COURT: After I read the materials to which I made reference and also reviewed the second draft of our special verdict form I tried to devine as best I am able what [p. 855] portions of Dr. Lee's testimony relate to the fact issues that we are going to give to the Jury; what testimony relates to the legal issues that the Court is going to resolve after the Jury decides its fact issues; and what testimony relates to neither. It is not an exact science, either his expertise nor mine, but I have done the best I can to try to figure out generally from the outline of testimony and also from the deposition whether or not any of it should go to the Jury and whether or not any of it should go to me and I am – I have concluded that portions of Dr. Lee's testimony is appropriate for Jury consideration and I will hear all of the balance of it whether it is appropriate or not in the sense that I will let him testify, I say I will let him, I won't let him testify to anything he wants to testify about, but I think the better rule for me would be to be liberal, if you will, if that is the right word, in the presentation of Dr. Lee's testimony to the extent I am hearing it as a Court rather than a Jury.

Now having said that there is nobody in here, you are all welcome to be here, I don't want anybody connected with the Jury in here at this time. Am I correct in assuming all of these folks are affiliated with one side or the other and nobody is connected with the Jury?

MR. FARROW: That is correct. Dr. Lee is the fellow on the aisle and Mr. Stinski and Mr. Keefer.

THE COURT: Sometimes we get Jurors' relatives and [p. 856] that sort of thing and that is what I am concerned about.

All right, now it seems to me that if you look at the outline, Roman Numeral I, cable being a medium for journalism, it seems to me that relates, or could arguably relate to the question of whether or not cable television is or is not a natural monopoly. Essentially the rest of his testimony, it seems to me, relates to the Court's determination of whether or not the restrictions of an RFP process impinge First Amendment rights and also whether or not the city's asserted defenses or reasons, if you will, do or do not constitute appropriate justification.

And the last item, Item 4 it seems to me in some areas Dr. Lee becomes judge in the sense that he decides in his opinion whether or not the RFP violates First Amendment and I guess that is why I am supposed to be here. So, I am going to let you start with him, Mr. Farrow, and go through – I don't know how you intend to approach his presentation, but certainly it seems to me he should be permitted to tell how cable TV works and what the relationship is between the operating company and the satellite company, the matter that in his view running of a cable system involves editorial choices, what channels

you are going to use, how you are going to divide up the time; and indeed if he wants to compare that to a newspaper or a magazine, so be it.

But from the standpoint of whether or not the [p. 857] ordinance controls the cable market to harm cable journalism I am not going to let him tell the Jury that because I am not going to let – have the Jury decide that. So I don't know how you are going to present what you are going to present but that is what I am going to rule.

Now you tell me how you can get his testimony within that framework.

MR FARROW: Well, of course, I have prepared the testimony as if we were going to give the whole thing to the Jury; but as I listen to the Court's ruling it seems to me that a good part of what we have prepared today to deal with is the ways in which the city sought to establish control of the medium and we did it for the purpose of demonstrating that that was the real purpose, not the stated purpose; in other words a stated purpose limiting access to the market as being aesthetics or disruption or natural monopoly or whatever, of course we think are pretextural but if you analyze the effects of the processes by the documents, that he could commen on to demonstrate that the mode by which that affects editorial freedom, you have an overwhelming result in the end when you look at all of that, you have an overwhelming result that the purposes of cities in general, and the specific purpose of St. Paul, was to control the medium, control it not only from the standpoint of getting benefits it was not entitled to get, but to control it from the standpoint of preventing criticism

* * *

[p. 861] say after the Jury makes a decision it is against the First Amendment principle the Court then has the obligation to review the evidence anew to see whether or not that the Court – see whether or not it has a different view of the evidence. This is an extraordinary situation but I think it comes about because of the fact that freedom of the press is considered to be so fundamental that you can't risk it.

THE COURT: Now, based upon what I have said I will let you do, I am willing to take his testimony by the Court after you have given the testimony I am going to permit to the Jury, as long as he is here, I am content to hear it. If you want to call him back for more with the Jury at some other date I will excuse the Jury and I will just hear his testimony.

MR. FARROW: It may be the way to go, Your Honor. I will try to – I will try as I go through it to obey the Court's strictures about what I am to cover with the Jury here. If I step over why it will be unintentional, I am sure that I will get objections from there and perhaps I should invite them at this time from the Court because the Court has a better feeling itself for where it wants to stop. I will try to stop and try not to go further but afterward I think while he is here I think if the Court is willing, I would appreciate the opportunity of going through all of the rest of the material I prepared.

[p. 862] THE COURT: I would be pleased to do that. I think that is the way to do it.

Let's hear from the defendants.

MR. FARROW: One last thing, would I still have the option to bring him back if I want to?

THE COURT: Yes, if you want to make, as a part of your rebuttal, additional offers with reference to his expertise in response to the city's claim; or if you want to then say Judge in his presentation to the Court he said A, B, C, D and now I want the Jury to hear that as rebuttal, you can either bring him back or you can ask me to have the deposition read, either way, I don't care, assuming that I feel at that point in time that it is properly for the Jury.

MR. FARROW: I don't see how you could be more fair in the process.

THE COURT: All right. You are Ms. McKinsey?

MS. McKINSEY: Yes, Your Honor. Basically we have no argument with the Court's ruling. We have taken the position that the vast majority of Mr. Lee's testimony is irrelevant to the issues in the case, that was the premise of our motion in limine. In addition a good deal of it also relates to the legal issues that the Court will decide. With regard to the background of the Cable Communications Board and that sort of testimony, we have no objection to that being submitted to the Jury. Our only objection would be that it is essentially

* * *

[p. 869] case I mean we have all been thinking about special verdict and to me how you try the case is embodied in the special verdict form, so I may well – the way it is put together now is essentially the way we have been talking about it for the last two or three weeks, I may give

you a draft here by the end of the week or starting next week and then you can comment on it.

MR. REVEAL: We would like to have that opportunity.

THE COURT: Yeah. Okay, Dr. Lee has been present and you have heard our dialogue here and you have gone through this twice before as I understand Dr. Lee before my friend Judge Wright and before a Judge out in California named Schwartz (ph.), is that his name, and they let you testify I guess essentially the way you did in your deposition. I am going to maybe be doing that, but only part with the Jury and part with me. Mr. Farrow will try to frame his questions consistent with our dialogue here this morning and I guess that essentially means that I don't want you telling the jury that a cable television operator has a First Amendment right because RFP's control journalism, I may let you tell that to me, but I will not let you tell that to the Jury. We are going to call your expertise in how systems operate, how in your view they make editorial judgments, the programming, the satellite thing, and essentially I guess what is Number 1 on your analysis of cable being a medium for journalism; and what

* * *

[p. 930] W. LEE DIRECT

A. Yes, they are.

Q. Are some operated pursuant to permits?

A. Yes.

Q. Some pursuant to licenses?

A. Yes.

Q. As an example, as an example of the permit process are you familar with the field of news racks?

A. Yes.

Q. All right. Are those typically located on public facilities pursuant to contract or permits?

MS McKINSEY: Objection, Your Honor, beyond the scope, calls for a legal conclusion

THE COURT: Objection sustained.

BY MR. FARROW:

Q. With respect to cable television systems, and I will direct your attention to Guam, are you familiar with that situation?

A. Yes.

Q. Does that company operate pursuant to a contractual franchise or a permit?

MS. McKINSEY: Objection, relevance.

THE COURT: Objection overruled, you may answer.

THE WITNESS: Guam cable television which is located on United States territory of Guam operates according to a business license which they have renewed every year. They do

* * *

not have the type of franchise agreement that Continental has with the City of St. Paul.

BY MR. FARROW:

Q. With respect to that particular system in Guam have you had occasion to discover whether or not it does anything in the way of news reporting?

A. Yes, they do.

MS. McKINSEY: Objection, Your Honor, again relevance.

THE COURT: Objection sustained and the answer will be stricken.

MR. FARROW: Excuse me just a moment, Your Honor.

THE COURT: Surely.

MR. FARROW: I guess from this point on it is another field, Your Honor, and the break place, so we would –

THE COURT: Thank you, counsel. Now we will have the cross examination of Dr. Lee with reference to his direct testimony in front of the Jury.

CROSS EXAMINATION

BY MS. McKINSEY:

Q. Good morning, Mr. Lee.

A. Good morning.

Q. Professor Lee, you are not an attorney, is that correct?

A. Correct.

Q. And in fact you have taken no courses in a school of law,

* * *

[p. 1764] T. HAZLETT DIRECT

quite that way or in any way.

MR. BRAMSON: I am telling you that we were concerned about waiving our first line position when we submitted proposed instructions and Jury verdict.

THE COURT: You never waive anything in this Court, I want people smarter than me to review this.

MR. BRAMSON: Transcribe that part.

THE COURT: Really I want you to keep whatever, keep any positions you have. I am not trying to bury anybody's positions, I am trying to understand them.

MR. BRAMSON: I think it is an invited error if one submits a Jury instruction without clarifying that it is not the first line.

THE COURT: Okay. Where does that leave me trying to prepare a verdict form I guess is where it leaves me.

MR. REVEAL: The second part of the thought here though is if there is only one, going to be only one, then there is no reason why the city should have to undergo the disruption of multiple cable television systems.

THE COURT: You want a question for the Jury would only one cable company survive?

MR. REVEAL: Yes.

THE COURT: Do you want a question would a franchise or a single system still feel what would otherwise – that is not the word I am going to use – but is there what you call a

* * *

[p. 2002] defendant.

THE COURT: It is called nunc pro tunc. Okay, anything else you want to do?

MR. FARROW: Yeah, we were going to ask that the testimony of Dr. Lee which was taken out of the presence of the Jury be given to the Jury. I should note that now that it is in the Court will recall I believe that the great bulk of that testimony was handled outside the presence of the Jury and dealt with the specific processes used by the City of St. Paul in connection with his franchising process.

THE COURT: I am sorry?

MR. FARROW: For example Dr. Lee was asked this: Document after document was used in the RFP process, whether that particular document would have a tendency to inhibit editorial judgment, so we think that all of his testimony should go to the Jury if the issue is going to be going to the Jury at all and I think they are entitled to hear the whole of the testimony. I say that at a time when I know that as of this time the Court really

hasn't made up its mind about what issues are going to the Jury.

THE COURT: I don't think anybody made up their mind, you are talking about the Court making up its mind, the walls told me one day that the defendant was thinking of – plaintiff was thinking about waiving a Jury.

MR. FARROW: We have certainly put that matter [p. 2003] through our mind, yes, Your Honor, and we are still considering that a possibility.

THE COURT: If you are considering it and if at the end of this case you are trying to figure out what direction I am flipping, I am not flipping any direction. Somebody is going to pay for that Jury, I am not going to have 10 people here for three weeks and then all of a sudden have one party tell me by the way, Judge, we don't want them anymore.

MR. FARROW: I understand the Court's feeling there and certainly it is reasonable to do that and we certainly haven't made a decision.

THE COURT: What is the problem?

MR. FARROW: I will tell you what the problem is, the question comes up about what is the thing that should go to the Jury and in our view we believe, and we know we are at the end of our case now, but we believe that the only issue that could go to the Jury and this Jury could really get is the question of damages. We believe there is no answer to the First Amendment position for the plaintiffs.

THE COURT: Why do you want a Jury?

MR. FARROW: To set damages and I will tell you another thing, Your Honor –

THE COURT: I will tell you, I will tell you why –

MR. FARROW: We just got through with Sacramento and I have been to Jefferson City, Missouri and I have never been [p. 2004] here before.

THE COURT: How did you get along with Judge Wright?

MR. FARROW: I don't think I ever want to go back to Missouri again and I am not going to try a case before Judge Wright again, there aren't enough big cases for it.

THE COURT: I beg your pardon?

MR. FARROW: There isn't a case big enough for me to want to go back in front of Judge Wright.

THE COURT: My sense is you want a Jury because you are entitled to it and you also want a Jury because you have a Judge who dismissed your case entirely and got reversed in the Court of Appeals and you don't know anything about the judge and you don't know how he is going to flip or flop, and I don't fault you for that, that is fine.

MR. FARROW: That is lawyer problems.

THE COURT: That is the way the world works, I don't fault you for that for a minute. But, don't come in here after you watch the Judge work for six weeks and say by God, he ain't too bad and maybe he is leaning our way, we will waive a Jury.

I thought that I wouldn't say it out loud, that is like not wanting to use the alternate jurors, you want to eyeball them, see how they look, that really gripes me to tell you the truth.

MR. FARROW: I think that is my job.

[p. 2005] THE COURT: You may think that is your job but I have a job too and when you have four people sitting here and then tell them to go home at the end of the case, I think that is cruel.

MR. FARROW: Eight out of ten or nine out of ten it is a different ballgame, but if it has to be universal then I am increasing my problems.

THE COURT: I have plaintiffs' lawyers who begged me to give them 12 Jurors, but that is your problem, it is also my problem when it comes to these Jurors. Okay, I don't know where all that takes us.

MR. FARROW: I think it takes us to the question of Dr. Lee.

THE COURT: Your view is that?

MR. REVEAL: We don't believe that Mr. Lee was competent to testify on any of the subjects and certainly none of the subjects that the Jury was going to be asked about and so for all the reasons that prompted the motion in limine to begin with we certainly don't believe his testimony to be read to the Jury, that portion of it that was before the Court.

THE COURT: I am going to deny the motion to read at this time with leave to renew at the close of the case.

MR. FARROW: Okay. We have a couple of more minutes?

THE COURT: I have until 12:30, what are we going to do with the Jury?

[p. 2029] about, each of which has been admitted by the defendant city in its answer to the complaint.

Paragraph 11 in the amended complaint reads: That in late 1979 the City of St. Paul issued a Request for Proposals, that you have heard referenced to as an RFP, designed to elicit responses from various prospective cable television operators thus permitting the city to choose whichever one it liked the most.

Paragraph 12 reads in response to this RFP at least seven different cable companies expressed a desire to operate cable television systems within St. Paul. On May 4, 1981, the city decided that it would exclude all cable companies and operate its own system, thus none of the seven were at that time permitted to operate cable companies within the city limits of the City of St. Paul.

On or about April 27, 1982, the City of St. Paul reversed its position and abandoned the idea of municipal ownership of a cable television system. Those are the allegations that were admitted in the answer and, finally, it is alleged in another paragraph in the complaint that the plaintiff and Continental Cablevision are both members of a class of persons known as cable television operators and for purposes of the case it is alleged that the plaintiff and the cable – plaintiff and Continental Cablevision are similarly situated members of that class

and that allegation in the [p. 2030] complaint was admitted in the answer.

Mr. Farrow, my understanding is that concludes the plaintiff's proof?

MR. FARROW: Yes, plaintiff rests.

THE COURT: Testimony for the plaintiff in its case in chief is concluded. Mr. Reveal for the defendant?

MR. REVEAL: Your Honor, as its first witness the city would call Mayor George Latimer to the stand.

GEORGE LATIMER,

called as a witness, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. REVEAL:

Q. Mr. Mayor, would you please state your full name and current address?

A. I am George Latimer, I live at 754 Linwood Avenue in St. Paul.

Q. And at the risk of asking the obvious, are you currently employed?

A. I am. I am the Mayor, of St. Paul.

Q. For how long have you held that position?

A. June 12 of 1976.

Q. And since June of 1976 how many times have you stood for reelection?

A. Five times since then.

* * *

[p. 2055] G. LATIMER DIRECT

process or a Request for Proposals, and in effect you say to the world we are interested in examining feasibility in this area, cable television, and we are requesting proposals from you and whatever that universe might be. In this case it was cable television, it might be laying sewers or a variety of other things, but you say we are requesting you to come forward and propose to us what you would do relative to bringing cable, and understood that, the city council received seven responses to that invitation.

Q. Do you have any understanding or recollection as to whether or not any one of those seven applicants were accepted?

A. They were not accepted at that time.

Q. What happened next?

A. It seems to me that the council thereafter determined that we ought to explore some form of municipal ownership and there was discussion along those lines somewhere around '81-'82 I know it led to a vote on municipal ownership to the spring of 1982 and I think – well, I think at that time there were municipal elections at the same time.

Q. When you say you vote, do you recall that there was a city wide referendum conducted on that subject?

A. That is correct.

Q. Do you have any understanding as to why that matter was put to the voters?

* * *

[p. 2140] G. LATIMER CROSS

studies done commissioned by the city, were there not?

A. I said before that there may have been which I was not aware of, but that I personally do not recall any such studies.

Q. I want to point your attention to Plaintiff's Exhibit Number 5 in evidence. Would you give us the title of that, Mr. Mayor?

A. The title is Report and Recommendations Citizens Advisory Committee on Cable Communications, November 15, 1979.

Q. All right. Were you aware of the existence of this Citizen's Advisory Commission, Mr. Mayor?

A. Yes.

Q. Did you, as a matter of fact, help appoint some of these people?

A. I think I did, yes.

Q. And they studied the subject matter of cable television for some period of time, did they not?

A. Yes, they did.

Q. And produced a report which was submitted to you and to the city, to the council?

A. That is correct.

Q. All right.

A. I think so.

Q. And that is at least a portion of that report there in your hands, right?

[p. 2141] A. It appears to be, yes.

Q. Yeah. Without making you take the time to read it right now, are you generally familiar with it? Have you looked at it before now?

A. I don't recall seeing it before.

Q. Could it be you have just forgotten it?

A. Of course, very possible I could have forgotten it.

Q. I would assume that if you had these citizens out studying the subject and if you were handed a report you would have looked at the report?

A. Typically I would. You asked me if I recognized the report and my answer is I do not.

Q. All right. You did see it when it came in?

A. I should have, but typically there would be markings on it that would have indicated whether it came through my office or to me, but I have to believe a report like this should have come to my office and from my office it would be reviewed by a staff person and sent on to me, typically that is the way we operate. However, I simply don't remember reading this. I might have.

Q. At any rate do you recall that such investigation was done on the cable television industry on behalf of the City of St. Paul; an investigation as to what evidence the City of St. Paul could get out of it?

A. Yes, sir. I recall before the formation of the Committee, [p. 2142] I recall the committee recommending to the council that their – it was now feasible and reasonable to proceed and from that recommendation flowed the City Council actions toward franchising. That is the part I remembered about this, but I don't really – do not remember much about the content of it.

Q. Well, it was kind of a process where various elements of the city structure, the municipal structure, were asked in what way could you use cable television, is that right?

A. Yes, I do remember there were task forces set up including city employees. Now I remember it because you mentioned it to me, in which they examined different parts of it, yes.

Q. Surely. So we had various department saying assuming we get cable at no cost, what can you do with it, right?

A. I don't know about the assuming cost but the broad outline of your question is did we have a task force of employees and citizens examining the benefits that would flow from cable and the answer is yes.

Q. Well, when you sought the creation of this task force you went really all through the fabric of the city to the hospitals, the neighborhood groups and in each case it was give us a list of what you want out of cable?

A. Right.

Q. Is that a fair characterization?

A. That may well have been true. I don't say I remember doing all of that but –

* * *

[p. 2170] J. SCHEIBEL DIRECT

Q. All right. And for how long did you do that?

A. I think the campaign lasted about six months until he dropped out.

Q. And what did you do then?

A. Then I organized a consumer health group in North Minneapolis. Then I worked as an organizer on the east side of St. Paul. Then Joann Showalter was elected to the City Council, I served as her aid for a year.

Q. Which year would that have been?

A. I believe that was 1978.

Q. All right. In your capacity as an aid, what kind of things were you concerned with or, otherwise stated, what role did you play?

A. I did some of her constituent work, I advised her on different policy matters, she chaired the energy, utility and environment committee at that time, so I provided staff assistance for that committee work, did speech writing for her, handled phone calls.

Q. All right. And when you left that position what did you do next?

A. That is when I went to Washington, D.C. to be Deputy Director of VISTA.

Q. What is VISTA?

A. It is Volunteers In Service To America.

Q. And what were your responsibilities in that capacity?

* * *

[p. 2173] Twin Cities' Marathon, St. Paul Port Authority, a number of other groups and local boards.

Q. Okay. Are there any other community organizations or civic organizations which you are particularly active in other than the ones you have already identified?

A. I think the ones I have named I am probably most active in.

Q. All right. Backing up to the period of time that you were acting as an aid to Councilwoman Showalter, I think you told us that was in 1978?

A. Yes.

Q. Did you at the time have any contact with the subject matter of cable television in the City of St. Paul?

A. Yes, I did.

Q. Would you please describe that for us?

A. As she began her term there were two issues of key importance I related to her committee, one was the subject of mandatory trash collection, the other issues she became involved in that related to her committee was the

area – was cable television. It was during my time working with her in the committee that she decided that a citizen's task force should again be set up to explore cable television in the City of St. Paul.

Q. Would you have been the staff person principally responsible for that activity?

* * *

[p. 2418] J. SCHEIBEL CROSS

during the year, of the status of the suit, what the different claims were, and I was aware that that was one of the requests of Nor-West that continued to be an ongoing request.

Q. And as far as you know that request, and that request continued on to today?

A. That is correct.

Q. Now if I can, Your Honor, Mr. Scheibel, I want to take you back to the era of 1979. A I understand it you were aware at that time of cable television and I am not sure, did you tell me that you participated in some way with the advisory committees work about the cable television?

A. I was working at that time for Councilwoman Schowalter, she chaired the Energy, Utilities and Environment Committee. One of the issues she was – that the committee became involved in, she became involved in was cable television. I worked with her during the initial establishment of the committee and it was shortly after the formation of the committee that I left to go to Washington, D.C.

Q. That was a committee that was chaired by Schowalter and had on it Brooks, Tschida, Brittson, Cochrane, Boldstein, Hayes, Kayser, Kennedy, Stantomski (ph.) and Tuscano (ph.)?

A. That is right.

Q. That is Plaintiff's Number 5 in evidence, that is the report and recommendation of that citizen's advisory committee?

[p. 2419] A. Yes.

Q. All right. Now is it – do you need a copy of this, would you like it? I am going to ask you a few things about it.

A. That would be helpful.

Q. I will give you my copy. Although you might have gone away before the report was prepared, you did come back and you did see the report later, did you not?

A. Yes, I did.

Q. Okay, and it is correct, is it not, that what that report is about is a recitation of the various ways that cable television would be of benefit to the City of St. Paul and to its residents, is that right?

A. That is right.

Q. And is there – there is nothing in that study whatsoever about any element of disruption or of ascetic problems or of economic scarcity or anything of that nature?

MR. REVEAL: Objection, Your Honor, the document speaks for itself.

THE COURT: Objection sustained.

BY MR. FARROW:

Q. When you used the document, when you looked at the document after you came back from Washington and were on the City Council, did you decide whether or not there was a need for a new study?

A. We decided there was not a need for a new study.

* * *

[p. 2556] S. ASHLEY CROSS

And down at the bottom I think there is a reference down there to $76 million would you read that out loud for the Jury now?

A The last paragraph reads while I cannot reveal the details of these statements I can report that the total net worth of these individuals is in excess of $76 million, a good portion of which is in liquid assets, including $10 million in cash.

Q Now did Ms. Blanchard have authority to make that statement on behalf of the bank?

A I assume she did.

Q It is on bank stationery?

A That is correct.

Q And with respect to the $10 million in cash that is called liquid assets, right?

MR. REVEAL: I am going to object on the grounds of relevance, relating to the financial statements or condition of any of the partners.

THE COURT: Objection overruled, the answer may stand – I am not sure we got an answer.

MR. FARROW: I don't think we got an answer.

THE COURT: I don't think we did. The objection is overruled.

MR. REVEAL: May I approach the Bench?

THE COURT: You may.

* * *

[p. 3486] A. SHETKA CROSS

proposal from the cable company to cut the streets instead of using the water tunnels?

A I believe the water – I don't know that, but I believe it was an alternate that was being explored to put it in direct, buried in the streets.

Q And that was the subject matter of the meetings you were involved with there?

A Yes.

Q And the outcome of that was that the streets were dug instead of using the water tunnels, is that right?

A Yes.

Q And that was because of the request from City Hall that they wanted to hurry up access of the cable system to City Hall, isn't that correct?

A I don't – I don't know if that was it or not.

Q The same memo, let me draw your attention if I may, were you advised of the meeting here, it is the top of Page 4?

MS. McKINSEY: Excuse me, Your Honor, this exhibit is not in evidence and I will object to any testimony regarding the content of it.

THE COURT: The objection is sustained but he may look at it to decide whether or not it helps refresh his memory. Do you want him to read that Page 4? Why don't you read Page 4 and he will ask you a question.

MR. FARROW: Read whatever you want to.

[p. 3487] THE WITNESS: I have read the top.

BY MR. FARROW:

Q Having read that, the top of that, does that refresh your recollection as to the reason that the streets were cut instead of the water tunnels being used?

A Again this meeting –

MS. McKINSEY: The question should ask for the witness' own knowledge and not anything –

THE COURT: Don't read from the memo, just tell us if that refreshes your memory about who it was that asked they use the streets rather than the water tunnels.

THE WITNESS; I recall that being discussed but I don't know what factors were all considered, why the water tunnels were ruled out. The expeditious installation may well have been one of the reasons, but I am not

positive that was all of the factors that entered into the decision.

BY MR. FARROW:

Q Have you seen that memo before, Mr. Shetka?

A I may have.

MR. FARROW: We would offer that memo in evidence, it is Exhibit 1661.

THE COURT: 61?

(Plaintiff's Exhibit 1661
offered in evidence.)

MS. McKINSEY: Your Honor we would object and if I

* * *

[p. 4270] Mayor's Office and would be in charge of the cable franchising process and reporting to me. Linda Camp would be fully responsible for the entire cable program. The staff team will focus on the application of cable services to improve city services, data and information transfer, library services, sewer system monitoring, police and fire alarms, staff training and the like. As city staff get up to speed they also could play a valuable role in developing St. Paul's entire cable system.

The staff team will have access to cable consultants in addition to Linda's assistance. Direct and indirect expenditures associated with the cable franchising process would be fully reimbursed. The cable companies' application fees and the final franchise award itself provide the necessary revenues.

This work is a priority. City government's greatest gain from cable will be in municipal applications. Our cable bid specifications should be the most demanding in the country. St. Paul should be no less than a national model of utilizing municipal cable applications through the private franchising process. We are all aware of the prevailing budget crunch. That last sentence has, on one it is underlined and on the right hand side of the page are the words "be careful"; on the left-hand side of the page it says for practical applications, security communications, [p. 4271] et cetera. Then it goes on to say potential internal applications are no small part of the solution.

Contingent upon the council's action, Linda or Tom will be contacting team members about an organizational meeting the first week of June. The second week in June a one day work session will be conducted. The individual staff time required is impossible to estimate. The busiest periods will be mid-June to early July when the draft bid specifications are being completed; and in November during bid evaluation.

It is possible, although not likely, that individual staff members could be spending up to one-half time on the effort during critical periods.

Do you want me to keep going to the next page?

BY MR. FARROW:

Q I think that solves the problem now, Ms. Camp.

This is the Mayor's memo written – what was the date of that memo?

A June 1, 1982.

Q Now that memo had been written after the voters of the City of St. Paul had decided not to have a municipal system, isn't that right?

A That is correct.

Q So that memo was written at a time when the city was electing to have cable television and electing to have whatever problems might come with having it, is that right?

* * *

[p. 5360] THE COURT: I am sorry, I am looking at the wrong page. 129 Line 12, all right.

MR. FARROW: To 131 Line 7.

THE COURT: Thank you.

MR. FARROW: Pardon me?

THE COURT: 131 Line 7?

MR. FARROW: Yes.

THE COURT: All right.

MR. FARROW: Okay.

THE COURT: You want me to hear from Ms. McKinsey before I make a judgment about that?

MR. FARROW: Shall we go to another subject, Your Honor?

THE COURT: Please.

MR. FARROW: With respect to Professor Lee, I would like to explain our position with that if I can.

THE COURT: Please do.

MR. FARROW: I made some notes here from the beginning, we have taken the position that the process used by St. Paul is content viewpoint related and for that reason that the applicable test to be applied by the Court in deciding the constitutionality of any deprivation of rights as alleged is that of strict scrutiny. Thus we don't believe that the O'Brien (ph.) test is applicable, even though we don't think that the city could meet that test, that is the test, that [p. 5361] four part test about is in the action within the constitutional power of the particular government, does it further an important or substantial governmental interest, is the governmental interest unrelated to the suppression of free speech or free expression; and is the incidental restriction on speech no greater than is necessary or essential – pardon me – essential to the furtherance of the governmental interests.

We think that is the test that they can't possibly meet; but even the real stronger test is that defendant must demonstrate a compelling government interest and demonstrate that the specific statute in question was closely drawn to accomplish that compelling governmental interest and I think the consolidated Edison case is the one that spells that out very strictly or very succinctly at Page 540.

We think the testimony of Lee both before the Jury and out of the presence of the Jury has demonstrated our position and that this testimony is corroborated by a host of exhibits as well as by oral testimony. But, in addition to being relevant to the question of applicable standards, we believe that Lee's testimony is entirely, in its entirety, is

relevant to issues which as of now we have to assume we may have to argue to the Jury; specifically we believe that Lee's testimony is relevant to rebut the repeated claims by defense witnesses that there has been no censorship of cable. These [p. 5362] questions have been put to the defense – by the defense to witnesses for the city, witnesses for CASP, witnesses for Continental and on a repeated basis uniformally they claim there has been no censorship or no censorship has been exercised or felt, even though as you might recall the executive director of CASP had to admit that he was required, that the organization was required to sign a contract with the city. He gave the city the power to put them out of business on only 30 days notice and without cause or any need for any cause being shown. Clearly the testimony in-camera of Professor Lee should be allowed to rebut this, what is I believe inherently untrustworthy opinion evidence.

Now the Court will recall the number of witnesses, I think Scheibel and Coleman and Gosman and Camp and Latimer, all those questions like that.

Secondly Lee's testimony in-camera should be admissible for an entirely different reason, it is the contention of the plaintiff that the veto of Nor-West can only be explained in realistic political terms in one way: The city elected to have only one operator for all the obvious reasons of securing benefits to both the city and to the elected officials. The benefits that could only be provided by limiting access to the market and then carefully dispensing the city's largess to a selected beneficiary, having made that decision, the only way you can make that work is you have to [p. 5363] be careful who you select. And, it had to be done in a such a way so as the benefits to be

obtained would be preserved, that they are continued, and what that took was at the very least the selection of a cable operator who would be a non-hostile member of the press, so to speak, to use my phrase a tame cable operator.

Now bearing that in mind a franchise made up or a franchise granted to a group made up of 11 financially independent local personalities, some of whom were already active in the community, would be a dangerous franchisee for those making that decision. There might be the possibility of a republican in the crowd or the wrong party, there might be the possibility of somebody in that group of 11 deciding a viewpoint on some issue that would not fit and so that makes sense, that you have to stop and think about what the comparison was on the other hand, compare it to the other and the franchisee based in Boston or New York whose only interest in local affairs is to make sure that he couried enough favor with the local officials to stay in business and get his system renewed and to make whatever profits could be made from a single cable operation, would certainly be – would fit the definition of a tame operator.

And now we think, we think that there is enough evidence in the record right now to support a finding that was the real – that that was the real purpose of the veto, the [p. 5364] real purpose of the limitation of the access to the market, and a real purpose of the selection of Continental and the real purpose for the refusal of a second franchise. This in-camera testimony, Lee's in-camera testimony would be probative of the fact that the process chosen does indicate a desire on the part of those who were voting on behalf of the city to influence at least in a

negative fashion if no other fashion, the content of programming and as such it is relevant to demonstrate that the stated reasons for the veto are not so; the reason for denying the second cable thing are not so; and to use the word of Professor Cribb (ph.) I think is the one who has these phrases, that these reasons given are nothing more than retrospective rationalizations and this is yet another reason why I think Lee's in-camera testimony may be admissible. No one in this case has denied the social and entertainment and educational value of access programming, we have never quarreled with the concept, but just as a newspaper controls its editorial page except letters to the editor, we believe a cable operator should control that access and that once that control is lost as it is with this process, that you have prior restraints, and in this case you get a prior restraint not only on the cable operator but you get a prior restraint on those who are doing the access programming through the control of GASP and or CASP, and their ability to wipe it out in case they don't like what it is doing and their [p. 5365] insisting it be accountable.

It can easily be anticipated in the current state of the record the defense will argue to the Jury that Nor-West opposes access and that is one of the great benefits to be had by the franchising process and if Nor-West should win that would be lost; that access is a wonderful thing, but for your decision in favor of the city it will be gone. I think Lee's testimony demonstrates the significant difference between access selected by the operator and responsive directly to those consumers, and access as handled by this franchising process and the institutionalization of

it as the facts have demonstrated has occurred here in St. Paul.

For all those reasons we believe that the in-camera testimony of Professor Lee should be read to the Jury and I appreciate the timing of the problem, but I don't know, without knowing more on what is going to come with the decisions to be made between now and the time the case is actually submitted to the Jury, I can't make a better decision about how to handle it than this.

THE COURT: All right. Mr. Reveal, do you want to respond to that?

MR. REVEAL: Very briefly, Your Honor. The legal reasons why Professor Lee's testimony should have been taken outside the presence of the Jury were already the subject of the earlier motion in limine that the city filed with respect

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[p. 5367] the presence of the Jury.

THE COURT: All right.

MR. FARROW: It is just – a quick response, Your Honor, if we were offering the testimony as being an appropriate measure of the law of First Amendment, I would be very happy to put Mr. Lee up against Mr. Geller anytime, but of course that is not the purpose of the testimony nor is it the purpose of the offer. Professor Lee is a professor of journalism and the purpose of his testimony, and I think the effect and the net effect of it was to demonstrate as to a journalist the chilling effect of various provisions of the process and various provisions of

the franchise ordinance, the various steps of the whole matter.

What is material and relevant about it is that effect and I believe that he qualifies as an expert to talk about the effect of those things on the business of journalism. Now the business of journalism is the press and that is what we are dealing with.

THE COURT: All right. I will have to review my notes on Lee's testimony in light of what you have just told me and I will do so.

Now Ms. McKinsey is here, we are covering Mayor Latimer's deposition, Ms. McKinsey, and the note that I have indicates that the defendant desires to read Page 11 Line 16 and Page – I am sorry, Page 11 Line 16 to Page 12 Line 24 and

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[p. 5493] Now the three documents with reference to expenditures came in, we have identified those and those have been received, Ms. Ronan is indicating yes.

MR. FARROW: Yes, Your Honor.

THE COURT: I have a document entitled Plaintiff's 441 which was offered yesterday which represents the minutes of the meeting of the City Council of the City of St. Paul June 30, 1983, at which the conduct of the city which gives rise to this case is formalized and discussed and it just seems to me basic that that document should be in the case and I am going to overrule the defendants' objection to it on the grounds of irrelevance and receive Exhibit 441.

(Plaintiff's Exhibit 441
received in evidence.)

MR. REVEAL: Your Honor, I understand the Court is admitting the document but I do not believe that that was a complete statement on the basis of the defendants' objections.

THE COURT: Well, whatever the basis, give me the rest of it if you want to.

MR. REVEAL: The additional objections I believe I noted were Rule 403 and it was cumulative of evidence already in the record.

THE COURT: And the record may note those additional objections which are likewise overruled.

The plaintiff has submitted Exhibit 543, Exhibit 551, [p. 5494] some attachments, 700, and the document that you referred to at the Bench just one moment ago, the number of which escapes me, can you help me, Mr. Bramson?

MR. BRAMSON: 1650, Your Honor.

THE COURT: 1650. All of these, as I understand, are offered as evidence of an agreement, an indemnity agreement between the city and Continental Cable Company and in addition to that the plaintiff has been kind enough to furnish to me a brief regarding the introduction of those documents indicating reference to Rule 411 and the like and the need to point out the adversity between the plaintiffs and Continental vis-a-vis certain of the Continental witnesses and other Continental evidence that comes in. I am satisfied based upon presiding over this trial that the Court has given the plaintiff more than

sufficient leeway to point out from any witness whether it has been expert, employee, or otherwise, the adversity that exists between Continental and the plaintiff and the fact that continental indeed paid fees and disbursements for a number of these experts originally engaged them, and that all that testimony has come in and Hostetter, Mr. Hostetter was clearly cross examined on his views about who should win this case, as the other Continental people, and it is abundantly clear to me, it seems to me, to everybody, that Continental is not rooting for the plaintiff and I don't think that that indemnity information is helpful to resolve the controversy [p. 5495] that exists between the city and Continental Cable Company (sic) and I am going to continue to exclude evidence of indemnity over objection of the plaintiff which would include as I understand it Mr. Farrow 543, 551, 700 and 1650. That is the purpose of these offers?

MR. FARROW: Yes, Your Honor. Your Honor, there is, I have one other document in my list.

THE COURT: I have missed one.

MR. REVEAL: I have an addition, 701.

THE COURT: If that is included within the offer for that same purpose –

MR. REVEAL: Excuse me, I misspoke, I have it in my hand, but it was the document which the Court admitted subject to having the first full paragraph on the second page redacted.

MR. FARROW: That will be done.

MR. REVEAL: Which we have now done?

MR. FARROW: And it is in evidence as I understand.

THE COURT: I show Plaintiff's 701 –

MR. REVEAL: Yes, sir.

THE COURT: I think Ms. Ronan and maybe one of the other folks, I have 701 in except for a paragraph, Page 2 Paragraph 2.

MR. REVEAL: That is correct, Your Honor.

THE COURT: I take it – I make enough mistakes

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[p. 5496] without making it voluntarily, I take it Mr. Reveal you are continuing to object to this indemnification?

MR. REVEAL: That would be a safe assumption.

THE COURT: I want the record to reflect my ruling is made at your insistence.

MR. REVEAL: It was our position before, during and at the conclusion of this case.

THE COURT: All right. The record may indicate that those offers have been made by the plaintiff and continue to be made with reference to evidence of indemnity.

MR. FARROW: Sure. I assume that our brief will travel with the record?

THE COURT: It won't but I would be glad to make both of those briefs, you see I don't docket briefs but on that issue if Mr. Reveal wants to docket his brief and you want to docket your brief I would be pleased to do that so the record is complete.

MR. FARROW: I would like to because that saves trying to make them of record. Those are our reasons.

THE COURT: That is fine. You submitted a brief in connection with your motion in limine?

MR. REVEAL: Yes, Your Honor, and the plaintiff responded to it at that time so if in fact we are going to adopt this procedure we would like to have the opportunity to prepare a brief response.

[p. 5497] THE COURT: No, no, no, no, enough is enough, this is what I had when I made my ruling and if you want to buttress it you buttress it with some brief that comes on different size paper on five because this is what I had when I ruled and that is all I think should be in the record at this time, that is it, and I will file and ask Ms. Frette to docket and maybe you folks should dig out copies of your motion in limine brief, Mr. Farrow's response to your motion in limine brief and the brief Mr. Farrow gave me yesterday with respect to the indemnity evidence.

MR. FARROW: All right, Your Honor, fine, Your Honor, we appreciate it.

THE COURT: Now I have the problem of Mr. Lee and I have gone back and read my notes with references to Mr. Lee and I am of a mind still or even, based

upon that review of my notes that I am not going to read Mr. Lee's testimony taken in-camera, just as I am not going to read Mr. Geller's testimony taken in-camera to the Jury. In my view number one I am not at all satisfied that the kind of things he is talking about where the proper subject of expert testimony and I so find.

More importantly it seems to me if they are the topic of expert testimony they go to the issues that are for the Court to decide and not the Jury to decide and for that reason I am not permitting it and, number three, I don't think there [p. 5498] is anything in his testimony that makes a fact that the Jury has to resolve that bears upon the facts that the Jury has to revolve. It seems to me that he is talking about matters that are for the Court after I get the Jury verdict and I understand you are continuing to object to the reading of his testimony in its entirety, Mr. Reveal?

MR. REVEAL: Yes, sir.

THE COURT: And you are continuing to offer it, Mr. Farrow?

MR. FARROW: I would like to note, Your Honor, that if the Court takes the position that it is the determination to be made by the Court as opposed to the Jury –

THE COURT: The determination of the issues he addresses is what I am talking about.

MR. FARROW: If the issues we are talking about are ones dealing with the – we call them generally the chilling affects –

THE COURT: You are talking about balancing effect?

MR. FARROW: If they are to be the ones the Court is to make the decision on as opposed to the Jury it seems to me I want to note now, and we can discuss it perhaps tomorrow if we need to some more, that that decision ought to be made before our issues are put to the Jury because what you have got now is that you have a record with the city telling the city witnesses and the CASP witnesses telling the Jury there

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[p. 5523] and the Mayor signed the franchise ordinance on that same date. November 14, 1983.

On December 5, 1983 several months after the lawsuit had been commenced, Mr. Farrow sent a letter to the Mayor and to the members of the City Council requesting that the city issue a cable television franchise on terms at least – issue Nor-West a cable television franchise on terms at least as favorable as the franchise recently issued to Continental.

I have placed on the easel before you an enlargement of Mr. Farrow's letter. Let me move that just a bit closer if I might.

The letter further indicated that upon the issuance of a franchise identical to the franchise issued to Continental that Nor-West would seek from the Minnesota Cable Commission Board of certificate of confirmation.

Because of the already pending lawsuit filed by Nor-West which sought damages and an injunction and an order invalidating the franchise award to Continental,

and because the city's entire franchising process had been called into question by Nor-West's complaint, as well as the integrity of both elected and appointed officials of the City of St. Paul, that request contained in Mr. Farrow's letter was denied.

Mr. Farrow's letter is significant for two reasons: first it is the very first time that Nor-West ever requested the issuance of a second franchise from the city and, although [p. 5524] Nor-West has argued and intimated over the course of the last 8 weeks that its earlier original complaint filed against the city was tantamount to a request for a second franchise, the evidence is to the contrary. Nor-West was specifically asked in interrogatories that were read to you over the course of the trial to identify "any and all meetings, discussions, or other oral communications in which Nor-West recommended or requested that the City of St. Paul issue more than one non-exclusive cable television franchise". Its response was as follows: "Nor-West is not at this time aware of any".

In the same interrogatories that were read to you Nor-West was asked to identify "any and all documents in which Nor-West recommended or requested that the City of St. Paul issue more than one non-exclusive cable television franchise". Nor-West's response was as follows "see letter from Nor-West's attorney Harold Farrow to Mayor Latimer and City Council dated December 5, 1983; and letter from Nor-West's attorney Harold R. Farrow to the city's attorney Ernest Reveal dated December 28, 1983. That is the first letter that is referred to in the answer, an that is the first request that Nor-West ever made for a second franchise to operate in competition with Continental.

I believe the court will instruct you that a party is bound as a matter of law by the admissions made in answers to interrogatories. As a result there is simply no room for any [p. 5525] argument as to when the first time was that Nor-West requested the issuance of a second franchise.

Now the other significance of Mr. Farrow's letter relates not so much to timing, but rather what it was that was being asked of the city. Against what I read to you from the letter is significant. What Nor-West requested was the issuance of a cable television franchise identical to that issued to Continental Cablevision. That is a system that would have been built throughout the city, including the downtown area; would have provided for an institutional network; would have provided support for access and local origination, programming; made commitments for municipal uses and would in all other respects be identical to the franchise issued to Continental pursuant to it proposal which is contained in the 8 volumes that are found on counsels table behind the easel here.

In marked contrast the system which Nor-West seeks to build today remains a mystery unknown to its own partners, and apparently even to its expert witnesses who testified in this case.

On January 10, continuing with our chronology, January 10, 1984, Nor-West filed a complaint with the Minnesota Cable Communications Board seeking denial of the issuance of a certificate of confirmation to Continental or, in the alternative, a contested case hearing. Under state law a certificate of confirmation had to be issued by the Cable Board

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[p. 5531] As I said earlier the August 2nd 1983 date has no particular significance other than to fix as a point of reference the date on which the Mayor signed the City Council resolution designating Continental as the franchisee. In addition I remind you that Nor-West admitted in its answers to interrogatories that the first date on which they requested the issuance of a second franchise was December 5, 1983, the date of Mr. Farrow's letter.

Now having established both of those things it is next necessary for you to determine for purposes of Questions 1, 2 and 3 of the Special Verdict Form what cable television system Mr. Farrow's letter requested permission to build and for the reasons that I have already mentioned, set forth in the text of Mr. Farrow's letter, itself, that system is identical to the franchise that had been issued to Continental some months earlier. Thus for purposes of Question One relating to financial ability, Nor-West must demonstrate that it had the financial ability necessary to design, construct and operate a system that would have been identical to that described in the ordinance awarding a franchise to Continental. And, based upon the testimony of Mr. Hostetter and Mr. White, both from Continental, the cost of constructing that system totaled some 43 and a half million dollars including both costs of construction and capitalized expenses which are appropriately, from an accounting standpoint, treated as capital costs and

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[p. 5542] express or, alternatively which could have been the basis for the city's denial of Nor-West's proposal. Inevitably then you must conclude with respect to the

third element of plaintiff's burden of proof, that is whether or not the city used the request for proposal process to discourage the expression of Nor-West's viewpoints, and since Nor-West had no viewpoints there is no viewpoint which the city could possibly have discouraged even if it had been of a mind to do so. Nor, in a broader sense is there any evidence that the content of programming played any part in the City Council's decision to ultimately award a franchise to Continental as opposed to Nor-West. This too was conceded by the partners in their testimony.

In short, I submit that you need not deliberate very long with respect to reaching the inevitable conclusion that the answer to Question Number Four is also "no".

Question Number 5: "at this time does Nor-West have the financial ability necessary to design, construct and operate the cable television system it has requested permission to build in competition with Continental Cablevision in St. Paul"?

Just as the evidence was clear in 1983 that Nor-West hoped to borrow the bulk of funds required to build and operate the cable television system which it then proposed, it is equally clear that Nor-West still hopes to obtain financing today.

[p. 5543] For example you will recall Mr. Keefer testified in his 1987 deposition that Nor-West still intended to obtain financing and he admitted on the witness stand during the course of his testimony here that he was unaware of anything that would alter his opinion today. However, Nor-West has not offered any evidence of an existing commitment for financing. And

certainly there is no more reason to believe today that the remaining partners would liquidate their present assets in order to fund the construction and operation of a cable television system than there was in 1983. In fact, even if the remaining partners disposed of all of their assets they still would have insufficient funds to build a cable television system identical to Continental, at a cost of 43 and a half million dollars. They simply don't have the resources with which to do that. Even if Nor-West were to build a significantly less costly system along the lines described by Nor-West experts who testified in this case, the partners would nevertheless still have to sell the bulk of their assets and pay substantial income taxes on the gains realized on the sale, which is the other reason why I submit to you that it is most improbable that the partners would intend to fund the cost of construction entirely out of their own pockets.

Furthermore there is no reason to believe that the remaining partners would be any more willing to put substantially more of their own money at risk in St. Paul than

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[p. 5546] his earlier characterization of this as a kamikaze mission, he would have been here to testify about his company's interest and/or willingness to participate in an overbuild. But he wasn't, and in fact there is no evidence that has been put before you that any cable company would have, with the necessary technical expertise, would have any interest in participating in an overbuild and in constructing and managing a system for

Nor-West today. For those reasons the answer to question Number 6 must also therefore be "no".

Question number 7, if Nor-West were given the opportunity at this time to build the cable television system it requested – it has requested permission to build in competition with Continental Cablevision in St. Paul, would Nor-West build such a system?"

With respect to this question two observations need be made. First, as of today the only cable television system which Nor-West has ever requested permission to build in competition is the one requested in Mr. Farrow's letter. That system was to be on terms at least as favorable as the terms and conditions issued in the franchise to Continental.

Nor-West's experts at trial have suggested that – excuse me – that Nor-West would build a pared down system which would cost less to build, provide fewer services, and would not be available to everyone, within the City of St. Paul specifically and in particular the downtown area apparently.

[p. 5547] Significantly the evidence is undisputed that Nor-West has never requested permission to build a pared down system that its expert witnesses referred to. it has never been discussed in any form, at any time before the St. Paul City Council and therefore the evidence is uncontroverted that Nor-West does not intend to build what it requested back in 1983.

Second, Nor-West cannot decide what it would build today in competition with Continental if given the opportunity to do so. As of the date of Mr. Farrow's letter of

December 5, 1983, Nor-West was seeking to build a system on terms identical to Continental's. Yet, when asked in their depositions in 1984, what system is Nor-West ready, willing and able to build in St. Paul in competition with Continental, each of Nor-West's remaining partners testified that the system that they would build is the system they originally proposed to the city in March of 1983.

In August of 1987 Nor-West's experts proposed a far less costly system that I referred too before, but disagreed among themselves as to what the cost of construction would be, with ranges varying between 19 million dollars I believe Mr. Cushing testified to, up to twenty-five million dollars as I, believe Mr. Stern testified to. That, system, whatever form it might ultimately take, at least in the mind of Nor-West experts, has never been proposed to the city.

And, finally, when Nor-West's own partners today were [p. 5548] asked on the stand what it was that they proposed to build, none of them could articulate what that system would look like. After five years of litigation Nor-West should have some idea of what, if anything, it seeks to build. And, by definition, if Nor-West doesn't know what it intends to build, it cannot prove that it would build that system. And, that question, excuse me, the answer to Question Number 7 must therefore be "no".

Now let me jump ahead in the special verdict form to Questions 11 through 18 which deal with the city's interests and then return later to questions 8, 9, 10 that deal with damages.

The first interest identified is referred to in special verdict Number 11 which reads: "As they existed in 1983 could the public facilities and rights of way in St. Paul have been able, by reasonable rearrangement, to accommodate more than one cable television system?"

The only persuasive evidence in the record regarding question Number 11 is the testimony of Mr. Baer and Mr. Garwood, both from – or formally from Continental; Mr. Fry from Northwestern Bell Telephone; Mr. Weber from Northern States Power Company and Mr. Ken Knuth who was the expert witness called by the city.

Each of those persons had personal knowledge of the state of the pole plant and rights-of-way in St. Paul as they existed in 1983. These witnesses not only corroborate one another but they also establish that the public facilities and

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[p. 5607] can not be based on conjecture or speculation; for all of those reasons I submit that the answer to question 9, and 10 must be zero in each case.

As I told you at the outset Nor-West claims in this case are a complete fairy tail. Nor-West has never been ready willing and able to build and operate a cable television system in St. Paul in competition with Continental; not in 1983 not now.

Furthermore the evidence is overwheiming that Nor-West has never truly intended to build and operate a cable television system in St. Paul in competition with Continental. This lawsuit is merely a concocted substitute for Nor-West's having been denied the franchise which

they originally sought from the city, namely the single non-exclusive franchise which the city chose, for good and sufficient reasons, to award to Continental instead.

What they seek is an award of millions of dollars of damage from the city for being denied the opportunity to build a cable television system in competition with Continental, something that they have never actually intended to do at any time, and perhaps the best evidence of that is their inability to tell you what it is they would build even if given the opportunity to do so.

There are compelling and substantial reasons supporting the decision to limit the number of cable franchises which it

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[p. 5750] In making your findings of fact you must not be influenced by your own views or opinions or by the opinions of any witness or the opinions have any of these attorneys as to whether the plaintiff's First Amendment rights may or may not have been violated. Your job is to simply answer the questions, the special verdict questions, based upon the evidence; and I then will apply the law to those facts as you find them, the facts, to be.

The First 3 questions you must answer on the special verdict form relate to whether or not – I am sorry – relate to whether Nor-West was ready, willing and able to be a cable operator in St. Paul in 1983. In other words, was the plaintiff a cable operator who would be entitled to First Amendment protection. To be ready, willing, and able, Nor-West must have possessed the financial ability, the technical capability and the intent necessary to design,

construct, and operate a cable television system in competition with Continental Cablevision in the City of St. Paul.

In order for you to answer Question Number 1 yes, the plaintiffs must prove by the greater weight of the evidence that it did have the financial commitments or ability to purchase, obtain or hire the necessary equipment, employees and facilities, to design, construct and operate a cable television system in the City of St. Paul in competition with Continental. You understand, as I am sure you do, that the cable system that [p. 5751] the plaintiff would have designed, constructed and operated, if it had been given permission, is in dispute between these parties. They don't agree as to what that was. You, as jurors, must determine what system the plaintiff had requested after the August 2nd, 1983 date. So it is your job to decide what system they requested and then determine whether the plaintiff had the necessary financial ability to design, construct and operate that cable television system that you find it requested.

This is not to say that the plaintiff had to actually design and construct and operate such a cable system during '83. Rather, the question is did the plaintiff have the financial ability that would be necessary to design, construct and operate the cable television system it requested in competition with Continental in St. Paul.

Question Number two deals with technical capability. In order to answer yes to question two Nor-West must have proven by the greater weight of the evidence that it

had or could have obtained the practical knowledge necessary to design, construct and operate the cable television system in 1988 in the City of St. Paul that you find it requested. So again you are going to have to resolve that fact dispute as to what system it had requested permission to build. That is whether the plaintiff had or could obtain the specialized expertise required to adequately build and operate that cable television system in competition with Continental in St. Paul.

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[p. 5753] of unlawful intent. It can't prove a state of mind hardly, what is in somebody's mind. An intent to volatile a persons constitutional rights, if it exists, is seldom admitted. But, it may be inferred from the existence of all of the facts and circumstances surrounding the episode. You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts which they knowingly do, or knowingly admit.

As stated earlier it is entirely up to you to decide what facts to find from the evidence. Keep in mind that viewpoint is defined as particular stand on a given issue or set of issues. This is different than merely types of programming offered by Nor-West or other cable operators, although types of programming could be indicative of a particular viewpoint.

Questions Number 5, 6, 7, deal with whether Nor-West today is ready, willing, and able to be a cable operator in St. Paul. To be ready, willing, and able, Nor-

West must possess again the financial ability, the technical capability and the intent necessary to design, construct and operate a cable television system in St. Paul. Again the cable system that the plaintiff proposes to design, construct, and operate, these parties are in dispute about and obviously they don't agree, upon.

Again you as jurors will determine what system the [p. 5754] plaintiff now proposes and then determine whether the plaintiff has the necessary financial ability to design, construct and operate that cable television system, that is the one that you find the plaintiff proposes.

In order to answer Question Number 5 yes Nor-West must have established by the greater weight of the evidence that it currently has financial commitments or ability to purchase, obtain or hire the necessary equipment, employees and facilities to construct and operate the cable system it proposes in competition with Continental Cablevision.

In order to answer Question Number 6 yes, Nor-West must have established by the greater weight of the evidence that it has or it can obtain the practical knowledge necessary to design, construct and operate the second cable television system which you find it proposes in the City of St. Paul, as it has requested in competition with Continental Cablevision.

In order to answer Question Number 7 yes the plaintiff must have established by the greater weight of the evidence that if given the opportunity by the city to build the cable television system which you find it now proposes to build in competition with Continental, Nor-West would in fact build such a system.

That brings us to eight, nine, ten. You must determine the amount of damages, if any, which have been proven under the evidence regardless of how you answer the other special verdict

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